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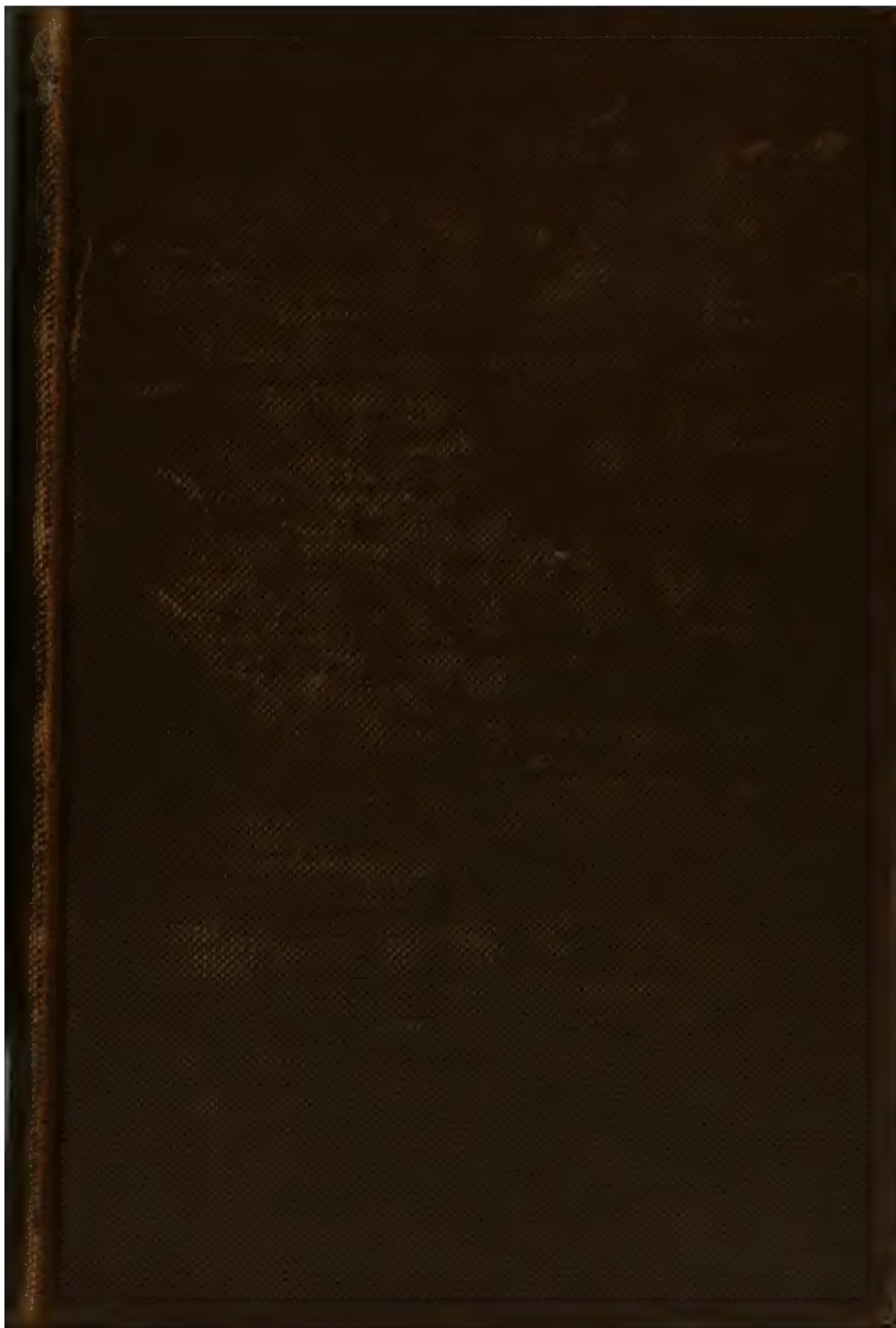
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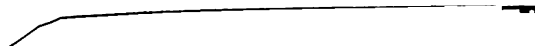
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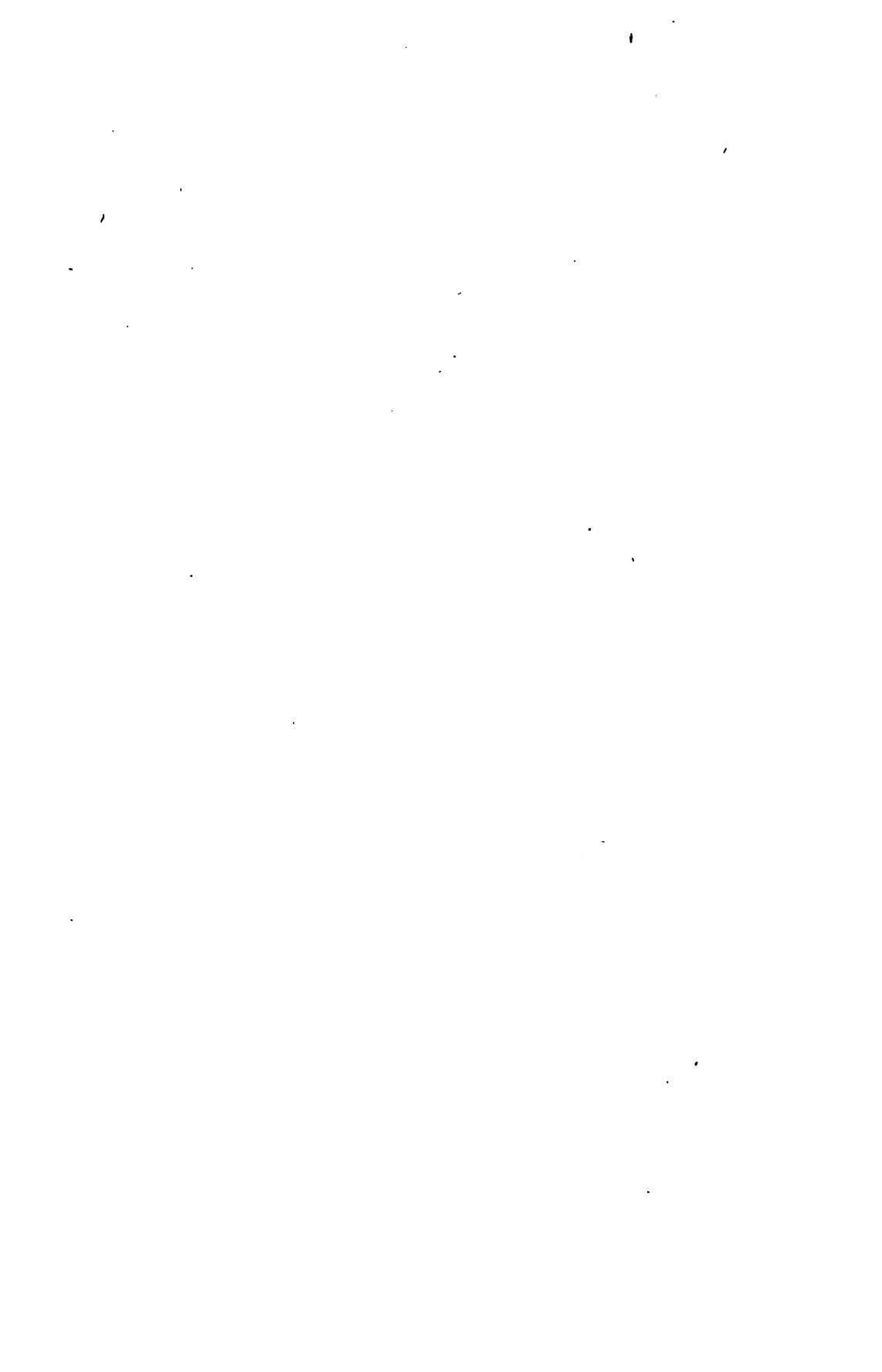
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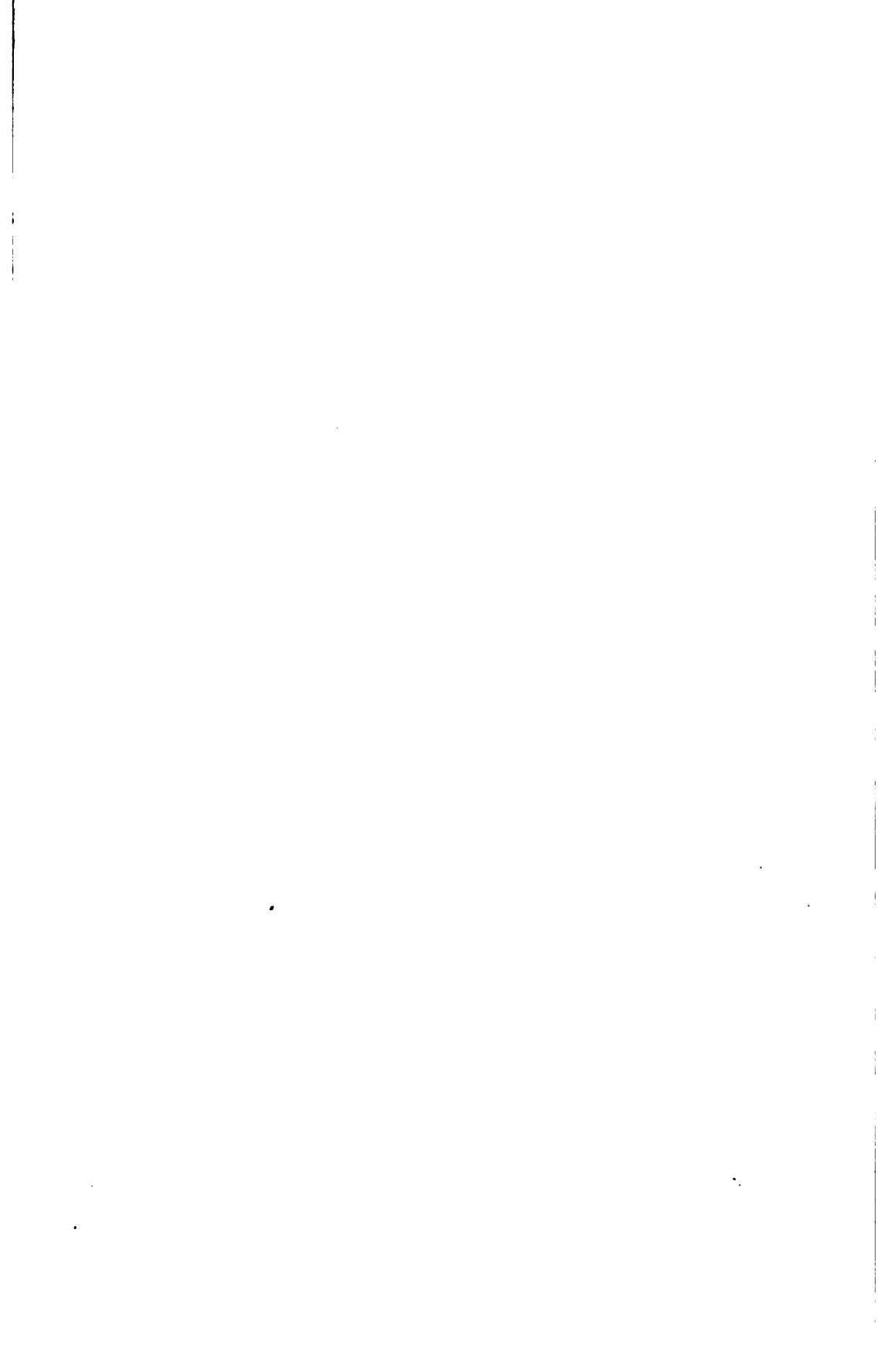
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SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF MORTGAGE

BY
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PART III

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rights of others; nobody has a right to complain; no injustice is done to anybody.

But it is also true that if the mortgagee seek a foreclosure in chancery, the mortgagor will be permitted to redeem upon payment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally clear that if a subsequent mortgagee or judgment creditor file a bill to redeem, he will be permitted to do so upon the payment of the mortgage debt alone. Whilst these well settled principles of equity remain unshaken, upon no system of analogy or consistency can the claim of the appellants be gratified. Their doctrine is in effect simply this, that in all cases where the sale of the real estate of a deceased debtor is decreed, the debts due to the heirs at law to whom such estate has descended, be their nature what they may, must first be paid, even to the exclusion of judgment creditors. To such a length the doctrine of tacking has never yet been carried.¹

¹ "There is no doubt as to the right of the plaintiff (mortgagor) to redeem the whole of the premises mortgaged; but as he who will have equity must do equity, it must be on condition not only of paying the sum charged upon the land, but the debt collaterally due to the mortgagee."—*Per Hosmer, Ch. J., in Scripture v. Johnson*, 3 Conn. 211 (1819). *Walling v. Aiken*, 1 MacM. Ch. 1 (1840); *Lake v. Shumate*, 20 S. C. 23 (1883); *Anthony v. Anthony*, 23 Ark. 479 (1861), and (semble) *Rowan v. Sharps Rifle Mfg. Co.*, 33 Conn. 28 (1865), accord.

The cases generally are *contra*: *Dorow v. Kelly*, 1 Dall. (Penn.) 142 (1785); *Bridgen v. Carhartt*, 1 Hopk. Ch. (N. Y.) 234 (1824); *Presbyterian Corporation v. Wallace*, 3 Rawle (Penn.) 109, 155 (1831); *Bacon v. Cottrell*, 13 Minn. 194 (1868); *Mahoney v. Bostwick*, 96 Cal. 53 (1892); *Brooks v. Brooks*, 169 Mass. 38 (1897).

CHAPTER II. (Continued.)

SECTION V. MORTGAGEE'S ACCOUNT.

(a) Waste, Repair and Improvements.

HANSON v. DERBY.

HIGH COURT OF CHANCERY, 1700.

(2 Vern. 392.)

Order 506 let. 506 2nd. 507 522 511 514 524 536.

The bill being to redeem a mortgage, on the hearing an account was decreed and £240 reported due; to which report the plaintiff had taken exceptions. The cause thus standing in court, the LORD KEEPER [SIR NATHAN WRIGHT], on a motion and reading affidavits that the defendant had burnt some of the wainscot and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a pauper, giving security to abide the event of the account.¹

Mortg. must not commit waste.

RUSSELL v. SMITHIES.

COURT OF EXCHEQUER, 1792.

(1 Anstr. 96.)

Mortg. not liable for ordinary decrease in value.

See note p. 507

On a bill of foreclosure, it was referred to the Deputy Remembrancer to take account what the mortgagee had received from the rents, &c., or might have received, without wilful neglect in her. It appeared that the premises (malt house, etc.) had been allowed to fall so much out of repair that the rent fell from £22 to £18. Plaintiff had done some repairs and had held 40 years.

Graham & Stanley argued that the mortgagee in possession, be-

¹ "So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court, on a bill brought by the mortgagor to stay waste and a certificate thereof, will grant an injunction."—Per Lord Ch. Hardwicke, in *Farrant v. Lovel*, 3 Atk. 723 (1750).

Mtgee in pos. must not commit waste. That is clear enough, but what is waste for him? Not much authority but law seems to be:

(a) If security- Suf. can only take usual profits from land - like a tenant for life for example.

If he takes more he is bd to ac to outgor for decrease in value of land. ~~But instead of this outgor can claim added profits obtained by mtgee's acts if he wishes. Mtgor of course can't have both.~~

(b) If security in suff. mtgee can open mines, cut timber, let so as to pay off mtge. Can do this w.o. for. closing. Must ac for all he then makes of course.

Above seems to be rule as to ~~sub-
stantial~~ waste. Per-
miss in waste in following cases.

Besides making mtgee ac as above outgor can enjoin waste if he wishes: i.e. where mtgee is acting beyond his rights.

Russell v. Seethies, 506.

Simply holds that mtgee is not bound to keep promises in the condition in which he got them, that he is not liable for ordinary wear & tear. That clearly so.

Wragg v. Druken.

- (1) At p 510 → is a paragraph that gives one a good idea of the usual q & a b/w mtgor & mtgee. Mtgee charges up ~~and~~ price. & int & money properly spent while in pos. Mtgor charges mtgee with all rents & profits. Of course whole section develops matter.
- (2) Investigating the attorney's life to see if fair & reducing mtge if unfair is perfectly in accord with law. Due to confidential relationship between client & lawyer.
- (3) Holds deterioration due to wilful default or gross neg. of mtgee is chargeable to him. This is the rule as usually stated. In an ex case held mtgee up to ordinary care. Seems that is the better rule. Letting mtgee off unless he is somewhat reckless in way he 'also with land is silly.

ing only a trustee till foreclosure, is bound to keep the premises in the same repair as if he was owner; 2 Vern. 392; 3 Atk. 518; and that the diminution in value should have been charged on the plaintiff, as she might have received the difference if she had repaired.

BY THE COURT: The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that, after 40 years possession, the mortgagee is bound to leave the premises in as good condition as he found them.

Defendant
is liable only for deterioration due to his gross negligence & willful default.

Defendant
Plff bought land of deft (1/3) & 3rd party (1/3) & gave deft a mortgage on whole for part of price due deft. T. Clarke drew the instruments. Later plff mortgaged other property he owned to T. Clarke & WRAGG v. DENHAM. T. Clarke with power of sale COURT OF EXCHEQUER, 1836, to receive monies for advancing 340 £ & (if necessary) on trust also to pay deft's 350 £. Int. being in arrears deft took possession of all the premises. Plff seek to redeem, alleging gross neg. by deft in not repairing, that 140 £ of Clarke's mortgage was for cost which of transaction which house was never taxed, asking an aff. in ss. of mismanagement of

In the year 1828 the plaintiff contracted with the defendant Denham for the purchase of two third parts of a freehold messuage and lands situate at Handley, in Derbyshire, for 350l.; and shortly afterwards contracted with some persons of the name of Hawksley for the purchase of the remaining third part. The plaintiff not being able to pay the 350l. to Denham, it was arranged that the whole of the property should be mortgaged to Denham to secure the repayment of that sum with interest. This arrangement was duly carried into effect by deeds bearing date in June, 1828. Those deeds were prepared by the defendant, Thomas Clarke, who acted as the solicitor for both parties.

In the same month of June, 1828, the plaintiff being seised of some freehold and copyhold property situate at Woodhead, in the county of Derby, by indentures bearing date the 16th and 17th of that month, reciting that there was due to one Boot, on the security of those premises, 140l., and that the defendants, Thomas and John Clarke, had agreed to pay off the same, and also to advance to the plaintiff 200l. more, it was witnessed, that in consideration of 140l. paid by the Clarks to Boot, and of 200l. paid by them to the plaintiff, the latter covenanted to surrender the copyholds, and released and conveyed the freeholds to the defendants Thomas and John Clarke and their heirs, in trust to sell the premises, and out of the proceeds of the sale to reimburse themselves their costs and expenses; then to repay themselves the 340l.

from the deft. Held (1) That the usual charging (570-). (2) That bill of atty. wd be examined by master to see if any overcharging. (3) That if deterioration of premises is due to gross neg. of trustee in pos then he is liable for damage then done to premises.

with interest; then to repay Denham his 350*l.* with interest, and to pay the surplus, if any, to the plaintiff.

In 1830 the interest on these mortgages being greatly in arrear, the defendants turned the plaintiff and his family out of the premises, sold the crops, and took and retained possession of the property. The Woodhead property was advertised for sale, but no sale was effected.

The plaintiff now brought his bill to redeem both mortgages, charging that the defendants had been guilty of gross negligence in the management of the property while in their possession, and ought to be made answerable for the damage done through their neglect; charging also that the money stated to have been advanced by the defendant Clarke was the alleged amount of his bill of costs, but was in fact not justly due to him from the plaintiff, and that in fact no bill of costs had ever been delivered; praying accounts of the rents and profits of all the premises, that the defendants might be chargeable for damage done from non-repairs, and that Clarke's bill might be taxed, &c.

The defendants by their answers admitted that the premises were out of repair, but ascribed it to the conduct of the plaintiff and an attorney whom he had lately employed, who, as they alleged, had done various acts to stop the sale of the property, and had thereby prevented respectable tenants from hiring it. The charge in the bill respecting the mortgage made to the Clarkes was explained thus: that 140*l.* was advanced by them to pay off Boot's mortgage; 126*l.* 17*s.* to pay the Hawksleys for their one-third of the Handley premises; and 78*l.* 16*s.* 5*d.* for Thomas Clarke's bill of costs. The defendant Clarke also insisted that before the plaintiff executed the mortgage deeds of the 16th and 17th June, 1828, he carefully inspected the bill of costs, and made no objection to any item therein; but the defendant did not recollect whether he had delivered to the plaintiff a copy of his bill of costs.

The cause coming on for hearing, the plaintiff gave evidence of bad husbandry and want of repairs on the premises since August, 1830, when the defendants took possession. In reference to the Handley property, one witness swore that a field of about three acres and a half was fallowed in the summer of 1831, and laid down on such fallow, and that three crops following the fallow had since been sold therefrom; and that the fourth crop was a hay crop, which was then growing thereon; and that the greater part of the remainder of the farm which should have been fallowed had not been so, but had been hardly cropped, without an adequate quantity of manure laid yearly thereon. It was also proved that the barns and out-buildings on the freehold premises were in a tenantable

state of repair in 1830; but since that time they had become very ruinous for want of necessary repairs, the wet being allowed to get in. In the judgment of the witnesses, the Handley property was in August, 1830, worth 16*l.* per annum, but now not above 9*l.* per annum. The Woodhead property was not so much depreciated.

Mr. Spence and *Mr. Hall*, for the plaintiff, submitted that special directions ought to be given respecting the deterioration of the property, and that *Clarke's* bill of costs ought to be taxed, 78*l.* being an exorbitant charge. Besides, it did not appear that any bill was properly delivered. [ALDERSON, B. No doubt the bill ought to be looked at by the Master. The attorney prepared the mortgage in his own favour, and part of the consideration money is paid over to his own client.]

Mr. Twiss and *Mr. Hayter*, for the defendants, Denham and Clarke.—No enquiry as to specific mismanagement ought to be allowed. If specific waste had been committed on the premises, as, for instance, by pulling down a house and selling the materials, such an enquiry would have been essential, but that does not apply to mere depreciation arising from bad husbandry. [ALDERSON, B. In *Hughes v. Williams*, 12 Ves. 495, Lord Eldon says, that “if the mortgagee can be shewn to be guilty of such gross negligence as comes up to the description of wilful default, he ought to be answerable for it.” The question is, whether there has not been here such gross negligence as to occasion depreciation; not merely whether there has been mishusbandry. What is alleged by the witness as to the manner of cropping the land, appears to be gross misconduct in the mortgagees.] The question is not between landlord and tenant, but between mortgagor and mortgagee. The tenant is under a contract with his landlord for the proper management of his farm, but the mortgagee is in no such situation. If, failing to obtain his principal and interest, he gets possession of the premises, he ought not to be responsible for anything beyond fraud. As to the bill of costs, it is clear, that unless it contains a taxable item, it ought not to be submitted to the Master for taxation. [ALDERSON, B. It is in the nature of a bill of costs which has been paid; and I think the Master ought to look at it.] If it is submitted to him with a view to surcharge and falsification, the plaintiff ought to point out the particular items which he objects to.

Mr. Spence, in reply, contended that it could not be consistent with the duty of a mortgagee in possession, so to manage the property, that when the mortgagor came to redeem, it was not worth half its value. He cited *Russell v. Smithies*, 1 Anst. 96, as shewing the principle on which cases of this nature rest, although there,

under the circumstances, the decision was in favour of the mortgagee.

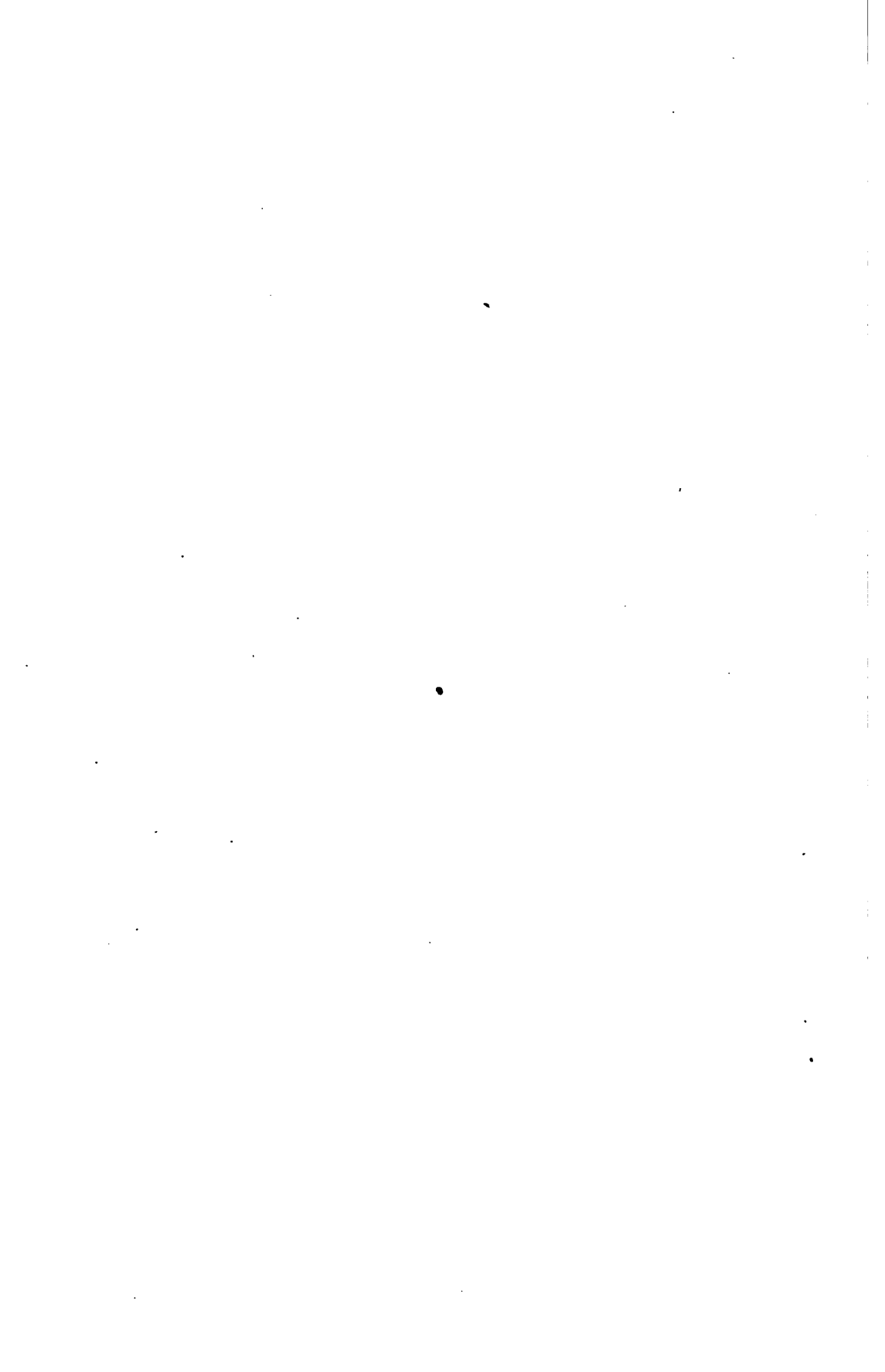
→ ALDERSON, B. There is no dispute that the account will be taken, generally, in the ordinary manner. The decree will direct the Master to take an account of the principal money and interest due to the mortgagees, to charge them with the rents and profits received by them since they took possession, and to take an account of the crops sold by them since that period; and upon making all due allowances, the Master will and ought to deduct from the monies found to have been received from the sales the expenses of the sales, and all necessary expenses which the mortgagees incurred to obtain a transfer from the purchasers of the crops of the monies due upon such sales.

The next question is, whether I ought to direct the Master to enquire into the amount of the bill which formed part of the consideration for the mortgage executed by Wragg to his attorney. I think I ought; because it appears to me that, Clarke and Wragg being in the situation of attorney and client at the time these transactions took place, Wragg's assent to the bill of costs was not such an assent as ought to preclude him from an enquiry upon the subject before the Master. At the same time it would be unreasonable to require Clarke now to enter into evidence of business done for his client; and the only question will be, whether, if the business were done, the charges are fair and reasonable. If the Master thinks that they are not so, he must make a deduction in that respect.

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why? Then comes the important question whether I ought to charge the defendants with the deterioration in the value of the premises since the period when Clarke took possession. It is clear that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time, which was the case in *Anstruther*.¹ There, the mortgagee was in possession of the premises for forty years; and during so long a time the decay would naturally take place, even supposing the premises to be repaired in the mean time in the ordinary way. I think, also, that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee; gross negligence is suffi-

¹*Russell v. Smithies*, p. 506, *supra*.



(1) That Rutger to secure to attorney fees he had charged, may be looked into to see if all fair we have already seen.

(2) That Rutger was liable for intentional destruction of bldgs or timber or like is of course clear. Why? arises when not intentional.

(3) As to improvements Rutger can make & charge to utgor. The case states law well. ⁵⁷² → They are

(a) Repairs nec. to keep prop. in Cond.

(b) Money laid out in protecting title of utgor. Not officious as protects Rutger.

(c) Money laid out by consent of utgor.

(4) Then being no evidence of improvements at all given the Ct, the Ct wd not refer that question to master at all. This was a case? of Ch. practice. It seems to be orthodox, Daniel, Ch. Prac. *2213 quote.

Under that rule then case was just the same as if no ev. of improvements at all offered. In that event of course Rutger cd not be allowed for any & all that was said as to improvements was dictum.

cient. The question therefore is, whether the fact of gross negligence is sufficiently established in this case to enable me to direct the enquiry asked for by the plaintiff. Upon that point I should like to look more minutely into the evidence, because if the Master be directed to make that enquiry, there will be considerable additional expense. If upon examination of the evidence I should come to the conclusion that a *prima facie* case of gross negligence is made out, I must direct the enquiry. If, on the other hand, I should be of opinion that there is not sufficient evidence of that fact, of course the principle of law will not apply.

On the following day his Lordship said that he had looked through the evidence, and upon the whole he thought he ought to direct an enquiry as to whether the deterioration in the value of the premises had arisen from the gross negligence in the mortgagees for want of proper repairs and proper cultivation. As to the other point, respecting the bill of costs, his Lordship thought that the Master ought to look at the bill with a view to consider the propriety of the items, upon the assumption that the business had been actually done.

Decree accordingly.

SANDON v. HOOPER.

HIGH COURT OF CHANCERY—ROLLS COURT, 1843.

(6 Beav. 246.)

This was a suit for redemption.

In 1830 the plaintiff mortgaged some property to the defendant, a solicitor, for 300*l.*; and in 1836 he executed to him a further charge, for a sum of 140*l.*, part of which consisted of a bill of costs due from the plaintiff to the defendant, and other part of arrears of interest and money paid. Default having been made in payment of interest on the mortgage, the defendant, in 1838, by an action of ejectment, recovered possession of the mortgaged property. After the defendant had taken possession, he pulled down two cottages on the premises and made some alterations. By his answer, the defendant stated that he had laid out 300*l.* in substantial repairs and lasting improvements; but of this no evidence was given.

Mr. Chandless, for the plaintiff, contended, first, that there ought to be a taxation of so much of the defendant's demand as con-

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cluded in utge & atty the he may be
investigated to see that charges
are proper.

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ise made

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incident of
utgor.

to warrant ordering an ac of improvements
master the utge must give some ev. of
such at public in any hearing.

utge must pay cost caused by
his error or default.

7. etc.

sisted of professional costs (*Wragg v. Denham*, 2 Y. & Coll. Exch., 117); secondly, that the mortgagee was liable for the damage done by pulling down the cottages (*Wragg v. Denham*); and, thirdly, that the defendant ought to pay the costs of the suit, it having been occasioned by his improper conduct in refusing to render accounts. (*Detillin v. Gale*, 7 Ves. 583; *Taylor v. Baker*, Daniell, 71; *Harvey v. Tebbutt*, 1 Jac. & W. 197; and see *Wilson v. Cluer*, 4 Beav. 214).

Mr. Kindersley and *Mr. Stevens*, for the defendant, did not oppose the taxation, but contended that the defendant was entitled to an inquiry as to the substantial repairs and lasting improvements, and to be allowed the amount; and that the defendant was entitled to the costs of suit, and of the ejectment.

Mr. Chandless, in reply.—There is no proof of any substantial repairs or lasting improvements; the defendant, therefore, is not entitled to any inquiry.

THE MASTER OF THE ROLLS [LORD LANGDALE]. It is objected on behalf of the plaintiff, and properly objected, that so far as the sum of 140*l.* consists of the bill of costs, which is payable to the defendant, it ought only to stand as a security for so much as will be properly due upon taxation. That is not disputed by the defendant; it has been very properly conceded to the plaintiff, that he is entitled to have that investigated.

In the year 1838, the defendant obtained possession by an action of ejectment, and after he came into possession he pulled down two of the cottages which were upon the premises, and he says, in his answer, that he laid out a considerable sum of money, to the amount of about 300*l.*, for repairs and substantial improvements, which he alleges were done with the privity and knowledge of the plaintiff. First, with respect to the dilapidations, they are proved; and there is not an attempt made in evidence for the purpose of shewing that it was proper. I am therefore of opinion that the plaintiff is entitled to an account of any loss occasioned by pulling down those houses.

The next question is, whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times, shewing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice, in which

Same pt as
in *Wragg v.*
att'y
dec'ing.

dict

cf. 522 ←

he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving a mortgagor out of his estate—an expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property.

Now, in this case, it has also to be considered, whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the Court. I quite agree with the argument that has been used on this occasion, that it was not necessary for the defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made; but, in this case, there is, as to that, a total absence of all evidence whatever. There is evidence, on the part of the plaintiff, to shew that what was done deteriorated the property, and there is not one word in evidence, on the part of the defendant, in support of his allegation, that he has laid out any money for lasting improvements, or that anything he did was done with the privity, consent, or knowledge of the plaintiff. In the absence of all proof, it is not at all within my authority to direct an inquiry to enable him to supply that in the Master's office, which he has already had an opportunity of doing. See *Marten v. Wichelo*, Cr. & Ph. 257. He may have done something towards the improvement of the estate; and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the Court to direct an inquiry upon the subject; but there is no such proof brought forward.

Another point has been raised in this case as to the refusal of the defendant to account. To excuse his refusal, the defendant alleges that he was under a mistake as to the party on whose behalf the application was made; but I think the circumstances sufficiently shew there was no mistake.

Under these circumstances I shall direct no inquiry as to lasting improvements. I think the plaintiff is entitled to an inquiry as to the loss sustained in consequence of pulling down the cottages; he is entitled to a taxation of the bill of costs, which formed part of the consideration for the further charge; and, considering the

course the defendant has taken, I think he is liable to pay some of the costs of this suit. I cannot, however, take it for granted that this suit would not have occurred if the estate had not been dealt with as it appears to have been; I cannot therefore say, that the plaintiff is to be excused from the whole costs of the suit up to the hearing. I think the plaintiff must pay the costs, except those which relate to the claim for lasting improvements, those relating to the plaintiff's claim for compensation for the dilapidations, and those which have arisen from the evidence, which the plaintiff has been obliged to enter into for the purpose of shewing the refusal to account. There must be an inquiry taken of what is due to the defendant for principal and interest, and for the costs payable by the plaintiff.

*of Mordaunt's
diligence, 526.*

*Mordaunt v. Jones. Defendant. Mordaunt
tells to sell under power in equity
hit fish. He says will deeper. He
get better water to make promise*
SHEPARD v. JONES. Saleable. It is ally sell.

SUPREME COURT OF JUDICATURE—COURT OF APPEAL, 1882. *to me who
use as a warehouse.*
(21 Ch. D. 469.) *He let this under into
pro bpn
price is
pd.*

By an indenture of transfer of mortgage, dated the 31st of January, 1874, the Victoria Brewery and other hereditaments at Wrexham were conveyed to the defendant, Edward Jones, for securing £2000, subject to redemption by Thomas Manby. By subsequent deeds further sums of money were charged on the same premises. On the 10th of October, 1878, Thomas Manby was adjudicated bankrupt, and the plaintiffs, H. Shepard and H. Davies, were appointed trustees of his estate. On the 18th of February, 1879, the defendant offered the mortgaged property for sale by auction under the power of sale in his mortgage, but no bidding was made for it. Several persons also inspected the brewery with a view of purchasing it by private contract, but declined to do so, alleging as their objection to it the inadequate supply and inferior quality of the water in the well on the premises. In August, 1879, the defendant took possession of the brewery, which was then vacant, and placed a person in it to take care of it, but did not himself occupy it.

In the early part of the year 1880 the defendant commenced boring operations to deepen the well, and eventually obtained a good supply of water. The defendant alleged that this was done with the knowledge and acquiescence of the plaintiffs. On the 12th of May, 1880, the defendant again put up the mortgaged premises

(1) Can debt charge for putting in will.

Suppose

(a) It is an ordinary redemption suit. Court ^{of Appeal} seems of opinion such a charge should be allowed. 530-7. Seems wrong. Is officious on part of mortgagee in proc. to make improvements on premises. It prevents mortg. redeeming. Mortgagee knows he is not owner & that to make such improvements & charge for them might prevent redemption.

He can make all repairs necessary to keep premises in cond. & in cond. for use & obtaining rent & profits but must not make substantial improvements except by consent of mortg. In Mass. a statute makes rule more liberal. In Pa. really nothing contrary to rule. Found no later Eng. case. ^{See Card} Gently in U.S. line is betw. nec. repairs & improvements. Dictum ⁱⁿ our case seems wrong on that proposition. Mortgagee ought to be allowed to redeem w/o paying for will. But

(b) Taking case that mortg. had not tried to redeem - that had been sale. & mortg. now wants surplus, rule may be diff. When mortgagee sells property it is much as if he had removed the improvement he has put on & rightfully removed it. Sale is rightful. While mortg. shd not be improved out of his estate yet if he lets it be sold seems mortgagee cd well deduct the amt by which the

selling price was increased by the improvement. Mitgor then is just as well off as wd have been if improvement had never been made. Reason - that Mitgor on redeeming is not bound to pay for improvement is not that he is entitled to it -- Mitgor prob. ought to be allowed to remove it. - but that his right to redeem ought not to be injured by making what he has to pay greater.

So on second ground would agree with - the case.

(2) Talk on last page (522) as to notice of course O.K. Notice to Mitgor can not affect him by making him pay for improvements unless he removes.

(3) Last point is as to occupation rent. Not much diff. whether you hold deft for ^{reasonable} rent because he occupied or whether you hold him for what he might reasonably have gotten in way of rent by using case. But if in a particular case there were a diff. why Ct of appeal clearly right. Suppose if land were rented 150¢ a month a fair rent but that for a period of 6 mos Mitgor cd not get a tenant. If in pos. occupying it himself wd be liable for 150¢. If not, liable for ^{nothing} what he can make out of it by reasonable efforts to make it pay a ^{rent} ~~case~~ ~~of~~ ~~land~~ ~~held~~ ~~had~~ ~~to~~ ~~cultivate~~ ~~a~~ ~~something~~ ~~cd~~ ~~not~~ ~~get~~ ~~a~~ ~~tenant~~ ~~but~~ ~~some~~ ~~eviction~~ ~~able~~.

for sale by auction, when it was bought by David Johnson for £5000, one of the conditions being that the sale should be completed on the 29th of September following. At that time the principal sum of £4000 and a considerable arrear of interest were due to the defendant. The defendant let the purchaser into possession of the brewery soon after the sale without requiring any rent from him, but the purchase was not completed nor the purchase-money paid on the 29th of September. The purchaser was not a brewer but a manufacturer of zoedone, and used the premises after taking possession as a storehouse for his goods.

The defendant tendered to the trustees £509 18s. 4d., which he considered to be the balance due to them, but they declined to accept it. They claimed in addition rent for use and occupation from the time when the defendant took possession till the 29th of September, 1880, and they also refused to allow the expense to which the defendant had been put to in deepening the well, amounting to about £83. The plaintiffs then brought this action against the defendant, claiming the balance of the purchase-money, and asking for accounts against the defendant as mortgagee in possession. The defendant paid £544 17s. 2d. into Court. At the trial the above-mentioned facts were proved, but there was a conflict of evidence whether the plaintiffs had notice of and acquiesced in the deepening of the well.

Nature of action.

The action was heard before Mr. Justice Kay on the 20th of February, 1882.

KAY, J. (after stating the circumstances of the case, and referring to the evidence) :—

I have listened carefully to the evidence, and have myself put some questions to the witnesses in order to ascertain if possible whether it was the fact that at the second sale the price was in any respect increased or influenced by the fact of the larger supply of water; but there is no evidence whatever that the price was so increased, and in the absence of that evidence, and as the brewery has been bought by a man who seems to be only using it as a warehouse, I cannot come to the conclusion that he gave more for it in consequence of the boring operations.

The rule of law is quite settled, and has never been altered from what was laid down in the case of *Sandon v. Hooper*, 6 Beav. 246, 248. There Lord Langdale states the rule thus: "The next question is whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times shewing what he ought and to some considerable extent what he ought not to do. Such re-

Held debt can-
not claim
any thing for
improvement.
They were not
nec. to keep
up premises or
protect title.

If acquiesces.
Cause of action
to shew when
may claim
for improvement, but he
must shew
they helped estate. That does not appear. Debt
is liable for occupation rent when he let
under in to use premises without charge.

pairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property, but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving the mortgagor out of his estate, an expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property." Now it must be under this last branch of Lord Langdale's judgment that the case of the mortgagee must succeed if at all. Had he got the consent of the mortgagor, or given him notice in which he acquiesced? I cannot find that either has been done, but if by any strain of language it were possible to assume that this comes within the case of the mortgagor having had notice in which he acquiesces, then, as Lord Langdale says, the mortgagee may be allowed for sums of money which have been laid out in increasing the value of the property; but then the *onus* would be on him to shew that the money was laid out in increasing the value of the property. Now this as it seems to me he has failed to shew. In the first place there is no consent of the mortgagees or trustees in bankruptcy; and in the second place no notice was given in which they acquiesced; and in the third place the mortgagor has failed to shew that what has been done has increased the value of the property. Therefore I am not able to direct an inquiry as to any improvements. I must say that if I had been satisfied that the value of the property had been increased I should have struggled very hard to prevent the mortgagor getting the purchase-moneys which represented the value of the property without allowing for the expenses that occasioned the increase of value; but, as I have said, I have listened attentively to the evidence, and I am not able to see that the mortgagee has proved that there was that increase, or that there was any notice by which the mortgagor can be fixed as acquiescing in these improvements.

Upon the other point the question is whether the mortgagee has been in such occupation of the property as entitles or makes it just for the Court to treat him as liable to an occupation rent. Now, ac-

i.e. if mortgagor acquiesces in improvements spending money w/o. improving estate and not come under terms of his acquiescence.

(4) But see ~~Whitney~~ Mickle v. Dillage, 526, for another limit on rule that outgoer can't recover for improvements. If outgoer in pos. thinks he is owner & makes improvements and then outgoer comes into possession & so is seeking Equity, he must do Equity - by paying for improvements.

according to a note on the case of *Trulock v. Robey*, 15 Sim. 265, 276, it was thought "advisable to state in a bill to redeem against a mortgagee in possession that the defendant, and if he is not the original mortgagee, those under whom he claims, have been in the actual occupation of the mortgaged estate as owner or owners thereof, in addition to stating that they have been in possession of the estate, and in receipt of the rents and profits of it, and to pray that the Master may set an occupation rent and include it in his account of rents and profits received." In this case it is proved that the mortgagee himself was not in actual occupation or using the premises, but after he had sold the premises to Johnson, he let Johnson take possession and use them, by storing goods there, and Johnson has used them ever since, and is now using them as a warehouse. Then the mortgagee either charged Johnson with rent or did not. I understand he did not, but if he allows that state of things Johnson must be treated as in possession as his agent, because if Johnson had no right to possession under the contract, then permission to take possession being given would make him an agent of the mortgagee. If Johnson has been in possession and using these premises for his own purposes, and the mortgagee does not choose to charge him rent as he ought to do, then the possession by Johnson is the possession of the mortgagee, and if the mortgagee himself had been in possession and using the premises as a warehouse, I could not have the least doubt that he would under the rule be liable to pay occupation rent. Therefore as he chose to let Johnson have that possession and use, I must charge him as though he had been himself in possession from the time when Johnson took possession. Accordingly I direct the usual account in the redemption suit as against the mortgagee in possession, and I direct the usual inquiry as to what he ought to be charged with as occupation rent from the time that Johnson took possession of the estate. I reserve the question of costs.

C. M.

From this judgment the defendant appealed. The appeal was heard on the 21st of July, 1882.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the appellant:—

We appeal from the judgment on two grounds: first, the defendant is charged with an occupation rent, although he was not in actual occupation of the brewery. No one is liable for an occupation rent unless he is making use of, or deriving profit from, the premises. In the present case the defendant put Johnson into possession of the brewery before the day named in the conditions of sale in order that the expense of a caretaker might be saved, but he received no rent from Johnson.

In the second place the learned Judge refused to allow the defendant the expense of deepening the well. There is evidence that this was done with the knowledge and consent of the plaintiffs. But in truth notice is immaterial if the outlay was for the benefit of the property. In the present case it is clear that the value of the property was increased. It could not be sold until a better supply of water was provided. A mortgagee in possession is always entitled to be allowed for permanent improvements (*Tipton Green Colliery Company v. Tipton Moat Colliery Company*, 7 Ch. D. 192; *Sandon v. Hooper*, 6 Beav. 246; s. c. on appeal, 14 L. J. Ch. 120). Mr. Justice Kay had only before him the report of the case before the Master of the Rolls. The report on appeal materially modifies the law as there laid down. Lord Lyndhurst says that if the value of the property had been increased he would have given the mortgagee the benefit of it.

Rigby, Q.C., and T. A. Roberts, for the plaintiffs:—

With respect to the first point, the occupation of Johnson was the occupation of the defendant. It was the defendant's duty to require Johnson to pay rent for the brewery until the day appointed by the conditions of sale for completion of the purchase. As he did not do so Johnson must be treated as his agent or servant. At all events the plaintiffs are entitled to charge the defendant with wilful default in not making a profit by the occupation of the premises, which comes to the same thing as an occupation rent.

The deepening of the well did not really raise the value of the brewery. It was the quality, rather than the quantity of the water, that was deficient. In fact Johnson did not purchase it for a brewery, but for a place for storing his zoedone. Whether the outlay really improved the property is a question of fact which the Judge decided against the defendant, and the Court of Appeal ought not to interfere with his conclusion.

JESSEL, M.R. My present opinion is that the appellant is entitled to succeed on both the points in this case. I have always understood that occupation rent is only charged against a mortgagee who occupies. If one wants authority for that proposition he will find it

See underlined in the case of *Trulock v. Robey*, 15 Sim. 265. The Vice-Chancellor there says: "A man may have been in possession of an estate without being in the occupation of an acre of it. Anyone is in possession of an estate who receives rent from the tenants who do occupy it. Why did not the plaintiff amend her bill by stating that the defendant had been in the occupation of part of the tenements? How can the Court make a decree on a fact that does not appear on the bill?" Therefore the plaintiffs have to shew that the defendant, the mortgagee, was in occupation. Of course, a man may be in

liable for what he shd have made. As to improvements the mortgagee can recover for improvements if they were reasonable & beneficial to the property. If the mortgagee did not assent. If unreasonable & not beneficial to the property the mortgagee is not liable for them. If improvements actually benefit the property the mortgagee is liable for them to prevent his gaining an unfair advantage.

Court Appeal

See underlined

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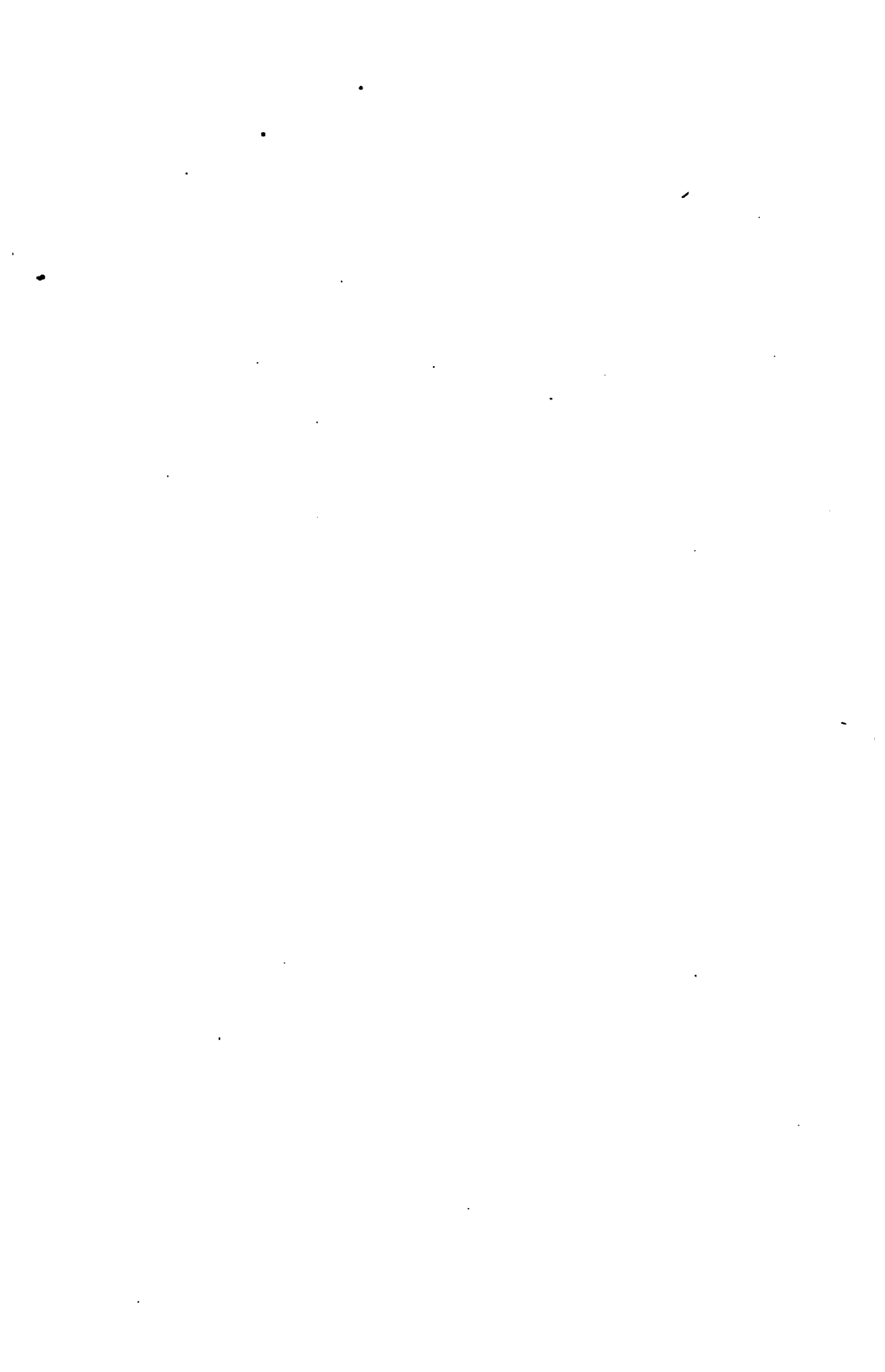
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occupation in law by occupying the house himself personally or by an occupation through his servants. In that sense I agree with Mr. Rigby's argument that a man need not be in what is called personal occupation, but occupation, like most other things in law, is a complex term, and it is impossible for a man to be in occupation if somebody else is in occupation; that is, excluding the case of joint tenants or tenants in common.

Now in this case the sale by auction was to a purchaser of the name of Johnson, and before the time of completion arrived Johnson asked the defendant, the vendor, to let him into possession. I am not going into the question whether he ought to have been let into possession on the terms upon which he was let in. It seems the defendant had a caretaker for him. Therefore he was in occupation through the caretaker in that sense up to the time that Johnson was let into possession. Then Johnson was let into possession on the terms of paying a part of the outgoings, as I understand. Whether they were proper terms or not is a question for inquiry. I have heard nothing to shew that they were not proper terms, but upon that I give no opinion, because there is the usual account directed for wilful default, and if it turns out that he was not let in on proper terms or on reasonable terms, the defendant may be liable for not getting all he might have got. But in no legal sense was the vendor in occupation after he let the purchaser into occupation. The purchaser was not his servant or his agent, but he was a purchaser entering in his own right and obtaining not only legal possession but legal occupation. It appears to me, therefore, there is no case whatever for charging the defendant an occupation rent simply because at that time he was not in occupation. That I think is sufficient to dispose of that part of the appeal which relates to the occupation rent.

With regard to the other point, it is one of more general interest. I have always understood the practice to be quite settled. If upon the hearing of a redemption suit the mortgagee, having charged in his pleadings that he has laid out money in lasting improvements, produces general evidence that he has laid out money in lasting improvements—that is, produces evidence of the laying out of the money, and that the works are *prima facie* improvements—that is sufficient for an inquiry. If he proves more, that is, if he not only proves that he has laid out money in permanent works, but they are really improvements and have improved the property to the extent of the money laid out, he will then get not only an inquiry but an account of the sums laid out in the lasting improvements. But, of course, to get the account he must prove a good deal more than to get an inquiry. Upon that point I will quote some of the words of

Lord Langdale in the case of *Sandon v. Hooper*, 6 Beav. 246, although *Sandon v. Hooper* went too far on another point, and was varied on appeal; but on this point there has been no appeal. Lord Langdale says this: "Now, in this case it has also to be considered whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the Court. I quite agree with the argument that has been used on this occasion that it was not necessary for the defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made." Then he goes on: "He may have done something towards the improvement of the estate, and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the Court to direct an inquiry upon the subject." That is, you want general proof of money laid out, and you want general *prima facie* proof that it has been laid out in lasting improvements. That being so, we have only to consider whether there was in this case proof of both those facts. There was not only general proof, but, as I understand, there was detailed proof as to the money laid out. There is no dispute about that. The money laid out was about £100; but was it proved generally and *prima facie* to be laid out in lasting improvements? Now it stands in this way; the money was laid out in boring for water. That was not at first productive, and then they laid out more money which was productive, and the quantity of water was largely increased. Whether or not that was an increase which added much to the saleable value of the property would be a matter for inquiry, but they did satisfy the two things laid down by Lord Langdale, namely, that they laid out money, and that the money was *prima facie* a lasting or permanent improvement. It was lasting and permanent, and it was *prima facie* an improvement; because it very much increased the quantity of the water in the well, whether we look on it as a brewery property or even as a property not used as a brewery, because it appears that a supply from the water company was no longer required. I think there is sufficient for inquiry even if there were no special circumstances in this case to distinguish it from the ordinary redemption suit. Of course, a mortgagee takes the inquiry at his own risk, as to what may be the result of the inquiry.

But there are very special circumstances in this case which I think distinguish it from an ordinary redemption suit, which puts the right of the mortgagee to the inquiry upon higher grounds. This is not a

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 ed by that can
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redemption suit at all. It is a suit brought by the mortgagor for an account from the mortgagee who has exercised his power of sale of the application of the proceeds of that sale and a claim for the balance. If it should turn out that the mortgagee has done something to the property at his own expense which increased its saleable value, I think it is plain on ordinary principles of justice, that that increase should not go into the pocket of the mortgagor without his paying the sum of money which caused the increase. It distinguishes it from the ordinary case of improvements. The increase may have been an increase which did not come under that denomination, but which increased the selling-price. It seems to me that wherever there is a case of that kind where the mortgagee can prove that the selling-price was increased by reason of the outlay, then to the extent to which that selling-price has been so increased the mortgagor cannot get the benefit of it without paying for the outlay. Of course the mortgagor could not be made to pay more than the increase; but to that extent it seems to me in ordinary justice the mortgagee is entitled to say, "You shall not get that increased benefit caused by my outlay without paying for that outlay."

In this case it seems that this property was a brewery. It seems also from the evidence that the supply of water was deficient both in quantity and quality, that there was an abortive sale, which was abortive by reason, to some extent at all events, of the defective supply of water, and that thereupon after the abortive sale the mortgagee set to work to supply the deficiency. There is a dispute whether he did supply it altogether. It is said that although he supplied it as regards quantity, he did not do so as regards quality. Then there was a second sale, at which the property sold for a good price, but the purchaser was not a brewer, and it is suggested that the purchaser would have given the same money for the property whether there had been this increase in the supply of water or not. Well, that may be so, but it does not at all follow that the selling value was not increased. It was a sale by auction. A brewer may have attended the sale, or several brewers may have done so, and they may have bid up to the last bidding before that which was bid for by the purchaser, because there was a good supply of water, and it was suitable for brewery purposes. If that was so, the price would be increased by reason of the additional supply of water, although the actual final purchaser did not want the water at all. That does not prove it. All I can say is, that there being in my opinion a *prima facie* case that the property was increased in value, it is fair that there should be an inquiry to ascertain whether it was so increased. Of course that inquiry will be whether any and

what sum ought to be allowed in taking the accounts of the defendant by reason of lasting improvements, and that will leave the whole case open.

There is another observation I wish to make on the supposed necessity of notice, and there are some words in the judgment of Lord Langdale in *Sandon v. Hooper*, which I have always declined to read literally, and which do not appear to me to be warranted by the judgment of Lord Lyndhurst. That is, as to notice. I am by no means prepared to say that Lord Langdale did not mean exactly what I am going to say: I rather think he did; but it was imperfectly expressed either by himself or by the reporter. As I understand it, notice is not necessary if the improvement is a reasonable one, and produces a benefit. The mortgagee cannot be deprived of that benefit because he did not tell the mortgagor of it. If on the other hand it is an unreasonable one, and produces no advantage, I do not see why the mortgagee should be charged with it because the mortgagee gives him notice of it. He could not prevent it, the mortgagee being in possession. That being so it seems to me that the real doctrine as to notice is, that where the mortgagee gives the mortgagor notice of the expenditure, and the mortgagor agrees to it, then of course it is unnecessary for the mortgagee to shew that the expenditure was reasonable. It is a contract. If the mortgagor does not actually agree to it, but does such acts as in the view of a court of law amount to tacit consent, or, as it is sometimes called, "acquiescence," that will also put the mortgagee in an equally advantageous position. But if the mortgagor simply does nothing, it appears to me that notice cannot affect the rights of the parties either way.

I think that is the true explanation of what was intended by Lord Langdale in *Sandon v. Hooper*, and I think that is the real view of the law on the subject.

Under these circumstances I think the appeal must be allowed.

As regards the costs there is an ample fund, and you can add the costs to the mortgagee's costs of this suit.¹

DEXTER v. ARNOLD, 2 Sumner, 108. (Circuit Court of the United States, 1834.) Bill in equity to redeem a mortgaged estate.

STORY, J., delivered the opinion of the court:—

The fourth exception is on account of the Master's having made a deduction of the supposed rent, upon the ground that the premises were out of repair and partly untenable while in possession of

¹ The concurring opinions of Brett and Cotton, L. JJ. are omitted.

what
to what
center means
But is simply Lord Langdale means
see p. 512 bottom

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Mortgagee is not liable for not repairing unless lack of m.

paid is due to his gross neg. or wilful default.

Needn't make an old house a good one.

Then mortgagor was seeking to recover, not the damage done to the estate by lack of repairs, but the rents mortgagee should have collected if he had repaired. see note to Wragg v. Druhan, p. 507. Then mortgagor sought damage to land & got it.

Seems mortgagor could have either but not both. But might have rental as if repaired + diff. in value of land at end of rental period possibly. That sort of claim seems not to have been made. Mortgagor has no chance to take money & repair until he redeems & so puts an end to mortgagee's pos. So should not be compelled to take dam. to land + interest. But may be said that mortgagor is allowing mortgagee to remain in pos by not redeeming & so should be compelled to take dam. to land at time of injury + int. But suppose deterioration occurs before mortgage due. Mortgagor then can't redeem. Then surely should have loss of rental up to time when he can redeem + diff. in value of land at that time + int from that time.

So
Option { 1. Can have what is just stated.
2. Diff in value at time of wrong + int.
3. Loss in rentals.

the mortgagee and his representatives. The argument seems to proceed upon the ground that the mortgagee was bound to keep the premises in good repair, and therefore ought to be accountable for such rents as he might have obtained if he had done his duty in regard to repairs. We know of no universal duty of a mortgagee to make all sorts of repairs upon the mortgaged premises while in his possession. He is bound to make reasonable and necessary repairs. But what are reasonable and necessary repairs must depend upon the particular circumstances of the case. If a house is very old and dilapidated, he is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended that he is bound to make new advances on the estate. In *Godfrey v. Watson*, 3 Atk. 518, Lord Hardwicke said that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. In *Russell v. Smith*, 1 Anst., R., 96, it was decided that a mortgagee, after long possession, was not bound to leave the premises in as good a condition as he found them. The fact, also, that there has been a diminution of the value of the rents was there declared not to be sufficient proof of a want of proper repairs. It is quite a different question whether, if the mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor. That is a point dependent upon other considerations. But where a mortgagee is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damages occasioned thereby. That was the doctrine asserted in *Hughes v. Williams*, 12 Ves. 495. And there is the stronger reason for this doctrine, because it is also the default of the mortgagor himself, if he does not take care to have suitable repairs made to preserve his own property. In the present case, however, the point does not arise, for there is no evidence in the Master's report which establishes any fact of wilful default or gross negligence in the mortgagee.

These remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings, while in possession of the mortgagee. There is no proof whatever that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

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is disturbed.

MOORE v. CABLE.

COURT OF CHANCERY OF NEW YORK, 1815.

(1 Johns. Ch., 385.)

Bill for the redemption of a mortgage. On the 26th of February, 1789, William Brown being seised of the premises, lot No. 54 in Smith & Graves's patent, conveyed the same to Joseph Roe, who, for securing the purchase money, reconveyed them to Brown by mortgage dated the 27th of February, 1789, and conditioned for the payment of £40, with interest, on the 1st of May, 1790. On the 28th of October, 1794, the mortgage was assigned to the defendant for the consideration of £30 by the brother of Brown, as his attorney. The heirs of Roe, on the 1st of August, 1807, sold and conveyed the premises to the plaintiff with covenants and warranty.

It appeared that the defendant entered into actual possession of the premises, by his tenants, in 1800, but had, previous to that time, exercised acts of ownership. He continued in possession until 1808, when he, in conjunction with one Corbin, took a lease from the heirs of Roe. Corbin, being in as tenant of the defendant, consented to let in the plaintiff with him; and the defendant brought an action of ejectment and recovered judgment in 1813, and has since continued in possession and made improvements by clearing part of the land, and has received the rents and profits. The plaintiff did not know until the trial of the ejectment in 1813, that the defendant held under a mortgage, and had in 1807 offered to purchase his interest.

THE CHANCELLOR [KENT]. Two questions are presented in this case:

1. Is the plaintiff entitled to redeem?¹
2. The next question is, whether the defendant, standing in the place of the mortgagee, can be allowed for what the case states as improvements in clearing part of the land. Such an allowance appears to me to be unprecedented in the books, and it cannot be admitted consistently with established principles. The defendant was, in this case, a volunteer. Instead of calling upon the debtor, or foreclosing the mortgage, he elected to enter upon uncultivated lands, and to exercise acts of ownership by clearing a part. To make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of the right of redemption. Many a

¹The opinion on this point is omitted, the court holding that the possession of defendant was not of such a character nor so long continued as to operate as a bar.

(1) Case in accord with prior dec. See
note to Shepard v. Stone, 514.

(2) Clear that if outgee can't get pd
for improvements the increased
rent that comes from them should
belong to Lessor. This settled.
Shows outgor not really entitled
to improvements but merely should
be freed from paying for them in
order to redeem.

debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make. The English courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt. In *French v. Baron*, 2 Atk. 120, the Chancellor would not allow the mortgagee anything more than his principal and interest, though there was a private agreement between the mortgagor and mortgagee for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate. The same thing was repeated in the case of *Godfrey v. Watson*, 3 Atk. 517, and Lord Hardwicke there said that a mortgagee in possession was not obliged to lay out money any further than to keep the estate in necessary repair; but if the mortgagee had expended money in supporting the title of the mortgagor when it had been impeached, he would allow it. The same doctrine was maintained in the case of *Bonithon v. Hockmore*, 1 Vern. 316, in which it was declared that no allowance was to be made to a mortgagee or trustee for their care and pains in managing the estate.

I shall, accordingly, direct a master to compute the principal and interest due on the mortgage down to the 1st of January last, and that, in taking the account, he charge the defendant with the nett amount of the rents and profits received, except such as shall appear to have exclusively arisen from his own expenditures in improvements; and that he allow for the expense of necessary reparations, if any, but not for improvements in clearing part of the land; and that he report with all convenient speed; all the other questions are in the meantime reserved.

O.K.

*Decree accordingly.*¹

¹ The authorities generally are accord. *Clark v. Smith*, Saxt. (N. J.), 123 (1830); *Gillis v. Martin*, 2 Dev. Eq. (N. C.) 470 (1833); *McCarron v. Cassidy*, 18 Ark. 34 (1856); *Sanders v. Wilson*, 34 Ver. 318 (1861); *Adkins v. Lewis*, 5 Oreg. 292 (1874); *Cook v. Ottawa University*, 14 Kans. 548 (1875); *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (1883).

In Pennsylvania the cost of permanent improvements "necessary and beneficial for the proper use of the property" will be allowed in an action of "equitable ejectment" brought by a mortgagor against a mortgagee in possession. *Wells v. Van Dyke*, 109 Penn. St. 330 (1885). In Massachusetts, by statute (*Pub. Stat. Ch.* 181, *Sec.* 23), "All sums expended in reasonable repairs and improvements" are allowed. *Merriam v. Goss*, 139 Mass. 77 (1885). And see *Gordon v. Lewis*, 2 Sumn. 143, 149 (1835), where this doctrine is recognized by Story, J.

But that the right of the mortgagee to an allowance even for necessary repairs is not absolute, see *Bank of Australasia v. United Co.*, 4 App. Cas. 391, 408 (1879); and *Booth v. Baltimore Steam Packet Co.*, 63 Md. 39 (1884). In *Barthell v. Syverson*, 54 Iowa, 160 (1880), such right seems to be denied.

only a usual state ment.

Simply suggests that if outgee wrongly claims to have full title he may not have all the privileges of outgee. No real value.

action for redemption.

526

EQUITY RELATIONS.

[CHAP. II.]

Various mortgages & Conveyances. (See →)

Ptiff is not gov. Deft is in MICKLES v. DILLAYE.

Validity-ambiguity of mortgage

also purchaser COURT OF APPEALS OF NEW YORK, 1858.

under a foreclosure sale (17 N. Y. 80.)

of a junior mortgage. Deft

that himself

owner. Ptiff

had contrib-

uted to his

relief by ly-

ing dormant

for over byrs.

Deft made

great im-

provements.

a new bldg.

on prop. Ptiff

sought to re-

deem with-

out paying

for this. Ad

causant. Deft

acted in good

faith, ptiff

contributed

to his mis-

take. Ptiff

has to come

into Eq. & so

must do Eq.

Appeal from the Supreme Court. The action was for the redemption of certain premises in the city of Syracuse, mortgaged to Philo

D. Mickles. The trial was before a referee, who found that the mortgaged premises were, in 1840, conveyed to Philo D. Mickles

by one Fitch. There was then outstanding a mortgage upon the premises, executed by Fitch to David Hall. Philo D. Mickles conveyed to the plaintiff, with warranty, March 8th, 1841, for the price

of \$4000, to secure \$2000 of which the plaintiff executed a mortgage, which in this suit he sought to redeem. This mortgage and

the bond collateral thereto were, in April, 1841, assigned by Philo D. Mickles to John Townsend. Philo D. Mickles purchased the

Fitch mortgage on September 23d, 1843, and on the 6th of November, 1843, assigned it to John Townsend, without the knowl-

edge or consent of the plaintiff, so far as the evidence showed. Townsend, on the 23d of September, 1846, sold the premises to

Charles A. Wheaton for \$1750, upon a foreclosure of the Fitch mortgage, of which no notice was served on the plaintiff. At the

time of this sale, Wheaton was the owner, by assignment from Townsend, of the mortgage for \$2000, executed by the plaintiff to

Philo D. Mickles. Wheaton took possession of the premises, and conveyed the same, with warranty, December 19, 1846, to John A.

Robinson, who conveyed, November 19th, 1852, to Henry A. Dillaye, also with warranty. The only question in dispute in this suit

was as to the allowance to be made to Dillaye for improvements after he took possession under the deed from Robinson; the effect

of the purchase by Philo D. Mickles of the Fitch mortgage being the subject of litigation in another suit.

P. D. Mickles was in possession of the premises at the time he conveyed them to the plaintiff, and when he received the mortgage

now sought to be redeemed. From that time until the sale under the attempted foreclosure he continued to rent them in his own

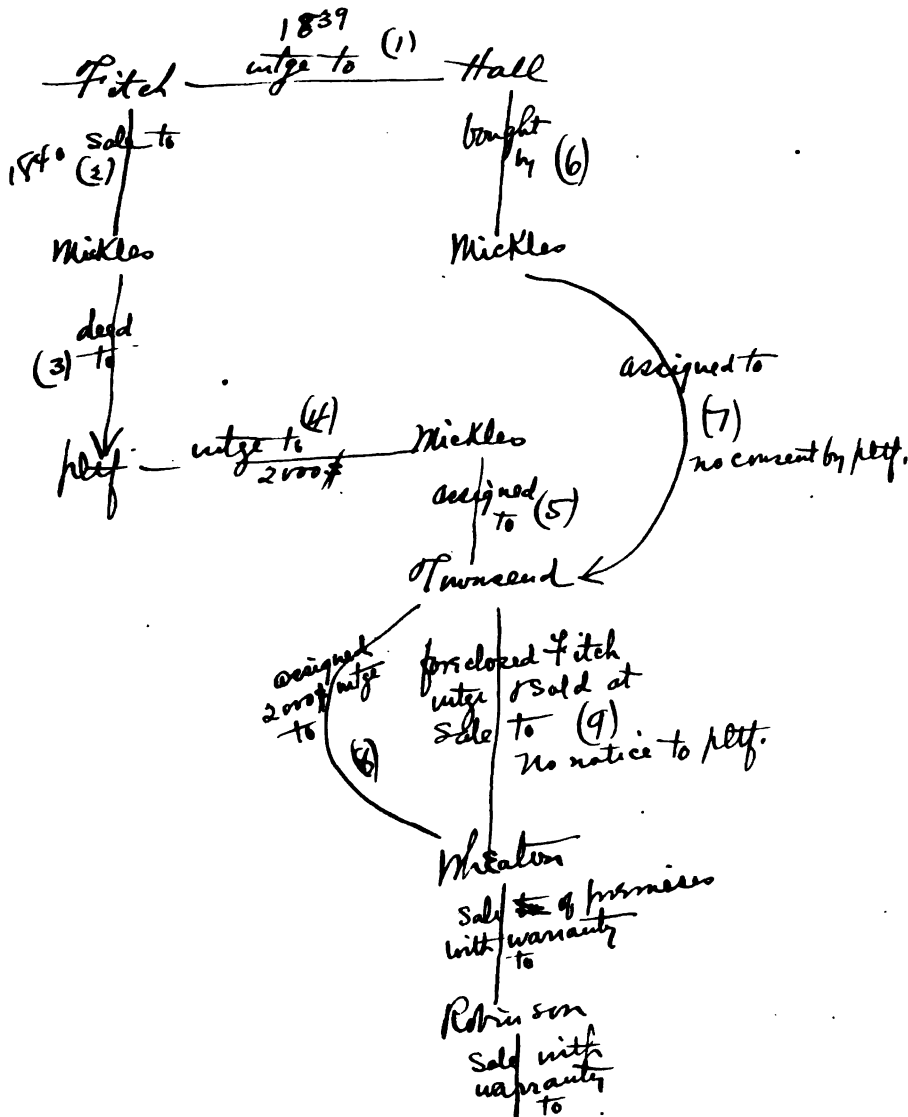
name and to receive the rents, without disclosing the interest of the plaintiff. They were assessed to him. Wheaton, the purchaser,

went into possession immediately after the sale, the tenants of P. D. Mickles attorning and paying the rent to him. P. D.

Mickles, who was examined as a witness, testified that when he heard of the sale, which he supposed was by virtue of the mort-

gage executed by the plaintiff, he told Wheaton he was very glad of it. He understood that the premises sold for enough to pay the

1. Fitch owned
1840 mortgage to Hall
Hall died & Mickles
2. Mickles owned
1841 mortgage to ptiff.
Mickles conveyed to ptiff
Mickles conveyed to ptiff
Mickles conveyed to ptiff



Only? in dispute in this suit was whether improvements made by Dillage after he took pos should be credited to him.

Clearly a? in Q. Contracts. How far can one who in good faith improves the property of another recover for the actual benefit conferred? First Conception is that the improvements have become owner's & so are his & that ends it. But that is plainly inequitable in some cases. ~~Suppose however who makes~~ Ma.

Who make improvements ought to have a right to enter & remove them where that is possible. Perhaps in such a case that should be his only right. Seems so.

But suppose can't be removed. Seems clear that so far as they put money into pocket of owner man making improvement ought to have that money. For example, if owner sells land & it sells for more because of improvement, improver should have surplus. Suppose he rents it & gets more rent. Improver should have surplus rent. But this would lead into too great refinement. Better to say owner can have it or to let improver recover its value from owner. Hard cases may be put. One is holding a lot on speculation. He can just afford to carry it. Some one bona fide grades it at an expense of \$2000. To owner of lot forced to sell or outgo lot to pay for this? Of course only forced to pay if grading actually increases value of lot. Putting outgo on lot not serious & case is very unlikely. Suppose 10000 house put on a 2000 lot. Seems clear then that man shd not lose the whole 10000. Weight of cases outside of outgo as well as these cases as to outgo lets improver recover.

43
Mickles
To be returned to the
Sale of the property
to the plaintiff.
1846
no
to the plaintiff.

mortgage, and he considered the matter settled, and that Wheaton had obtained a perfect title. The purchasers of the premises under Wheaton took possession at the time of their respective purchases. There was a brick building on the lot, which was erected by P. D. Mickles in 1842 or 1843. It was about nineteen feet wide, thirty-five feet long and two stories high. After Dillaye purchased, and in 1852, it was found that the old building was in a dilapidated condition, and was ready to fall down. The walls were badly cracked, particularly the one in the rear. It could have been repaired at an expense of about \$250, by taking down the rear and one of the side walls and rebuilding them. Dillaye caused it to be rebuilt and enlarged, at an expense of about \$5000, increasing its length to seventy feet, preserving one of the walls and the floors, and making use of the old materials so far as they would answer. He covered it with a tin roof, and put in gas and water pipes. He then rented it in its improved condition.

Transferred
to Wheaton.
Order to Return
Order to Deft.

The referee found the foregoing facts in substance; and stated that the improvements made by Dillaye were permanent and valuable and were made by him in the full belief that he was the absolute owner of the premises. He added that it appeared from the evidence that while the improvements were making, the plaintiff was absent from the county of Onondaga and that there was no evidence that he was aware of the fact while the improvements were progressing. In matter of law he determined that the plaintiff was not obliged to allow anything on account of the rebuilding beyond what it would cost to repair the old tenement. He proceeded to state the account, charging the plaintiff with the mortgage debt and interest, the repairs estimated upon the principle above stated, premiums of insurance and taxes, and the interest on these last items, and crediting him with the rents received, but without including the increased rent on account of the rebuilding, and making due from the plaintiff, to be paid on the redemption, \$1885.99. The defendants excepted. Judgment was rendered, allowing a redemption upon the payment of that sum according to the report, which was affirmed at a general term in the fifth district. The defendants appealed.

2 in NY.

DENIO, J. The right of a mortgagor who has made default in the payment of the mortgage debt according to his contract, and especially where the mortgagee or his assigns has lawfully acquired the possession, is in equity, and not a strict legal right. It would be impossible for the plaintiff to obtain possession of these premises by any suit or proceeding known to the law, except a suit in equity. When the mortgagor comes into a court of equity in such cases to redeem, he must do equity to the mortgagee, or the court will con-

But Im-
provement
made by
Dillaye.

Suppose he then
died? but then
a judge of the
first instance.
Perhaps N. Y.
being near.

sider the estate absolute in the latter; and the redemption, when allowed, will be decreed either absolutely or under certain conditions according to the nature and justice of the case. (Powell on Mortgages, 387, 388.) In conformity with this idea of the nature of the equity of redemption, the Court of Chancery has always obliged the mortgagor to submit to equitable conditions. It was formerly held, for example, that if the mortgagor, after giving the mortgage, had borrowed a further sum of the mortgagee, the latter was not obliged to submit to a redemption until both debts should be paid (*id.*, 391, 392). The tendency of modern decisions has been to limit and define the power of the mortgagee to insist upon conditions to the redemption. It is by no means intended to state there is any unlimited discretion in courts of equity to compel the owner of an estate bound by a forfeited mortgage to do whatever may in a popular sense and without regard to legal precedents be considered equitable in the particular case. It is, however, useful to bear in mind the origin and true character of the right of redemption, when called upon to determine a case not falling within any settled course of adjudication. It is still the rule that the mortgagor seeking to redeem must do equity to the mortgagee, or those who have succeeded to his rights; and where it has not been settled what is equity under the circumstances which attend a given case, the court must determine it according to its own sense of what is morally just and right.

Where the conventional relation of mortgagor and mortgagee is shown and acknowledged between the parties, there is no reason why the latter should be allowed to obstruct the right of redemption by expending money upon improvements. He can at any time call upon the debtor, by suit of foreclosure, to elect whether he will pay the debt or incur an absolute forfeiture; and if he is found making costly improvements there is good reason to suspect a design to avail himself of the present inability of the debtor to discharge the incumbrance in order to confirm his title to the estate by embarrassing the right of redemption. The general rule is therefore understood to be that upon taking the account in a suit for redemption against a mortgagee in possession, he is to be charged with the rents and profits, and be allowed only for necessary reparations. (*Moore v. Cable*, 1 John. Ch. R. 387; *Quin v. Brittain*, 1 Hoffman's Ch. R. 353; *Story's Eq.*, § 1016.)

So if the mortgagor, having in fact only a redeemable estate, should, even in good faith, deny the mortgagee's equity, this ought not to prejudice the latter, provided he had done nothing to mislead the mortgagor, and had not unreasonably slept upon his rights. In order to apply the cases in which permanent improvements have

But these mortgage cases may be put upon
the further ground that here perf. is se-
curing relief in Equity; to wit, an accom-
modation ^{by} mortgage; & that being so he must
do Equity - by paying for improve-
ments.

In some cases the def. Justice
making mortg. pay expense of im-
provement & making him pay the
benefit he really receives in loo-
sight of.

That convey to mortgage is also de-
intended as a mortgage is of course
not suff. in itself to show that mortgage
think B.F. he is full owner. But
form of transaction may be so on
pt.

In a case in Mass it was held
that where mortgage & mortg. had in
effect agreed that mortg. wd re-
lease Equity to mortgagee ^{as being valueless} & mortgagee then
made improvements he shd be
allowed for them.

been allowed to be taken into the account, it is necessary to have a clear view of the situation of these parties at the time the improvements were made. The defendant Dillaye was in possession as owner under a deed with warranty from a person in possession holding a similar evidence of title from one who had purchased the premises at a sale made professedly upon the foreclosure of a mortgage executed by the true source of title, and who had taken possession under that foreclosure. It is easy to see that an examination, such as a very cautious man would have made, would have shown the invalidity of the foreclosure. But the omission to make an examination was not such gross negligence as to charge the defendant with bad faith. He cannot claim that the estate is irredeemable because he supposed it to be so; but he is not deprived by his omission to examine, of the position of a person acting in good faith without actual notice. The referee has found, what could not be doubted upon the evidence, that he believed himself to be the absolute owner of the lot. But the plaintiff had very materially aided him in coming to this conclusion, or rather, he had suffered him to fall into that error, by an unjustifiable breach of his own obligation. His mortgage was executed in March, 1841. One-fourth of the principal and one year's interest were payable in about one year thereafter, and the whole debt was payable on the 1st day of June, 1845. He was in default for a portion of the debt for eleven years, and the whole amount of principal and interest had been in arrears more than seven years when this suit was commenced. He had not paid the smallest amount, and so far as appears, had never during that period recognized his indebtedness. Conceding, as we must do upon this case, that the sale by P. D. Mickles to the plaintiff, and the giving back of the bond and the mortgage sought to be redeemed was a real and not a colorable transaction, the plaintiff was in possession, up to the sale upon the foreclosure, by P. D. Mickles as his servant or agent or as his tenant. This possession was voluntarily abandoned and given up to Wheaton upon his purchase after foreclosure sale, and the latter immediately entered upon the reception of the rents and profits as owner, and he and those who succeeded him have continued to possess the premises as owners, unchallenged and without actual knowledge of this right of redemption, until shortly before the commencement of this suit, a period of eight years. When Dillaye erected the building, he and those who had preceded him in the title under the supposed foreclosure had been in possession as owners about six years. It is not found by the referee that the plaintiff was ignorant that his agent or tenant had been put out of possession upon pretence of the old mortgage, or that Wheaton and his grantees

*Wheaton and
plff's intge
to Mickles
too must
have known
of plff's int.
But his suc-
cessors may
have been
entirely un-
knowledge
of plff's int.*

were in possession, claiming as owners under that proceeding; and considering that the premises lie in one of the most considerable interior towns, and upon the great thoroughfare through the state, it is no wise probable that he was ignorant. The referee finds indeed that he was not aware of the improvements while they were going on. This is not inconsistent with a full knowledge that his tenant had yielded up the possession to a party claiming the absolute title, and that the occupants were in possession, believing themselves to be the owners. The fact probably is that both parties acted in ignorance of their rights. The old mortgage is claimed to have been extinguished by the operation of a technical rule of law. Had it remained on foot the right to redeem both mortgages would not have been of much if any value until the defendant had improved the premises by the expensive erection which he put upon them. If the plaintiff was not aware of the extinguishment of the old mortgage he would naturally have considered his interest as nominal; and this, I am persuaded, is the explanation of his long inaction. The case, when Dillaye erected the building, was this: he really had the title of a mortgagee in possession, but he supposed he was the absolute owner. The plaintiff had in fact an equity of redemption, but he had abandoned the possession to the defendants, who entered as owners; and he had ceased to claim any interest in the lot. He now finds that he has a valuable equity of redemption; and the question is whether he ought to pay for the improvement as a condition to the redemption. It was necessary that Dillaye should make expenditures to a considerable amount to render the premises tenantable at all; but he laid out more than was strictly necessary, though not more than would have [been] judicious had he been, as he supposed he was, the owner. In *Benedict v. Gilman*, 4 Paige, 58, the plaintiff had purchased under a statute foreclosure which did not cut off the rights of judgment creditors whose lien was subsequent to the mortgage, and had taken possession; and he had made permanent improvements in ignorance of the existence of certain judgments in the hands of the defendants. He filed a bill, claiming a strict foreclosure unless the defendants would pay up the mortgage and the value of the improvements, and this was decreed. The chancellor said it would be inequitable and unjust to give the defendants the benefit of these improvements without compelling them to pay an equivalent therefor. The defendant's case in the present controversy is much stronger than the plaintiff's in *Benedict v. Gilman*, inasmuch as the judgment creditors had done nothing to mislead the party in possession, and the negligence of the latter in omitting to search for subsequent incum-



brances was at least as great as that of Dillaye in this case. Judge Story has carried the rights of a party in possession, who has in good faith made improvements, altogether beyond what would be necessary to protect the defendant in this case. He says generally that courts of equity have extended the doctrine to cases where the party making the repairs and improvements has acted *bona fide* and innocently and there has been a substantial benefit conferred on the owner (Treatise on Eq., § 1237); and he has carried the principle into practice in a case decided by him in the Circuit Court of the United States. In *Bright v. Boyd*, 1 Story, 478, lands had been sold by an administrator, but the sale was void because he had not given security according to the statute. The heir of the intestate had sued for and recovered the possession against the plaintiff, who derived his title under the administrator's sale. The latter filed a bill in equity in the Circuit Court of the United States to recover of the heir the value of certain improvements which he had in good faith made upon the land, and which included the building of a large dwelling-house. The heir was an infant, and resided in another state; but Judge Story, notwithstanding, referred the case to a master to take an account of the enhanced value of the premises, deducting the rents and profits, with a pretty strong intimation that the plaintiff was entitled to recover them, though he said he would look into the case again upon the coming in of the report. This conclusion could not probably be sustained except upon the principle that one who fraudulently stands by and sees another expending money in good faith upon his land, shall not reclaim the land without paying for the improvements. Chancellor Walworth, I think, laid down the true principle in *Putnam v. Ritchie*, 6 Paige, 390. He decided in a case very similar to that which was before Judge Story, that where there was no fraud or acquiescence on the part of the person having the legal title, he could not be compelled, even in favor of a party in possession who had made improvements *bona fide*, to allow for such improvements; but he said that such allowances were constantly made by courts of equity where the legal title was in the person who had made the improvements in good faith, and where the equitable title was in another, who was obliged to resort to the court for relief. This, as we have seen, is precisely the case now before the court.

In *Wetmore v. Roberts*, 10 How. Pr. R. 51, the question we are now considering was examined in the Supreme Court by Mr. Justice Hand, with his accustomed industry. It was a suit for foreclosure by a junior mortgagee, the defendant having purchased the premises from one who had bid them in upon a foreclosure of the elder

mortgage, in which proceeding the junior incumbrancer was not made a party. It was alleged that the defendant had made improvements in good faith, of the value of \$6000, and it was decided that the premises should be sold, and that the value of the permanent improvements as well as the amount due on the elder mortgage should be paid out of the proceeds; after which the plaintiff was to be paid the amount due on his mortgage. I refer to the authorities relied on by Judge Hand, and also to *Talbot v. Braddill*, 1 Vern. 184, and to Coote on Mortgages, pp. 392, 561.

I am clearly of opinion that the refusal to allow for the erection of the building was erroneous. The judgment of the Supreme Court should be reversed, as respects the account stated by the referee, and there should be a reference in that court to take an account between the plaintiff and the defendant Dillaye, in which the latter should be allowed for the enhanced value of the premises on account of the improvements made by the defendants. In other respects, the order should direct the usual allowances between mortgagor and mortgagee on a bill for redemption.

HARRIS, J. The plaintiff acquired his title to the premises, such as it is, in March, 1841. The purchase price is said to have been \$4000. Of this, no part was ever paid. The plaintiff executed his bond and mortgage for \$2000, and, as Philo D. Mickles, the grantor, now testifies, it was agreed that the remaining \$2000 should be applied upon a note which the plaintiff held against him. There was no written evidence of such an agreement, and the indorsement was, in fact, never made. At the time of the conveyance the Fitch mortgage was an outstanding incumbrance upon the premises, and yet no provision was made for its payment, nor did the plaintiff in any way protect himself against this incumbrance, except by the covenant of warranty in his deed. Indeed, it does not appear that the plaintiff ever so much as inquired whether the property was incumbered or not.

For five years, and more, after the conveyance, the grantor continued to possess and enjoy the premises, as he had before. He received rents in his own name; paid taxes and assessments; made improvements; and, in short, held himself out to the world as the absolute owner. There is no evidence that the plaintiff ever claimed to be the owner, or that Philo D. Mickles ever, by word or act, recognized his ownership.

At the time of the foreclosure of the Fitch mortgage, in 1846, the amount due upon the two mortgages was at least equal to the value of the premises. Certainly, it exceeded the purchase price mentioned in the plaintiff's deed. Philo D. Mickles was then insolvent. There was no inducement, therefore, for the plaintiff or

Philo D. Mickles to prevent a foreclosure by paying off the mortgages. Upon the foreclosure, the defendant Wheaton, who had then become the owner of the second mortgage, became the purchaser, and thus, had the foreclosure been perfect, both mortgages would have been satisfied. Wheaton would have become the owner of the premises, but at a cost probably exceeding their value at that time. After the sale Philo D. Mickles inquired of Wheaton whether the premises had brought enough, and, upon being informed that they had been sold for the amount of the mortgage, he expressed his gratification that the matter was settled.

Wheaton, as purchaser, went into possession, and soon after conveyed the premises by deed, with warranty, to the defendant Robinson, who held the premises about four years and then sold to the defendant Dillaye. The latter, in 1853, "in the full belief that he was the absolute owner," as the referee has found the fact to be, proceeded to make "large and permanent and valuable improvements upon the premises, costing some \$5000, more or less." The property being thus doubled in value, it became an object for the plaintiff to assert his right of redemption. Accordingly, after sleeping upon his rights, such as they were, for nearly thirteen years, he commenced this action in 1854, claiming the right to redeem; and the question presented is whether, assuming the right, any compensation shall be made to Dillaye for the large improvements he has made.

*See Wheaton
did wrong
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help int.*

All will agree, I think, that the plaintiff presents a case which entitles him to no greater degree of favor than the established rules of equity applicable to this case entitle him to demand. "I should have been glad," says Mr. Justice Allen, in pronouncing the judgment now under review, "to have found some principle upon which the defendants, who have, in perfect honesty, expended their money to a large amount in the permanent improvement of the property, by which its value and productiveness have been and are greatly enhanced, could be reimbursed, at least to the amount of the rents and profits which they had received." We are therefore to consider whether the plaintiff stands upon any legal right which precludes the court, in granting the relief for which he applies, from doing substantial justice between the parties.

I admit the general rule to be that, where the simple and acknowledged relation of mortgagor and mortgagee in possession exists, the latter will not, upon redemption, be allowed for general improvements made without the acquiescence or consent of the mortgagor, especially if the improvements tend to cripple the power of redemption. *Moore v. Cable*, 1 John. Ch. R. 385, was such a case. The assignee of a mortgage, without calling upon the mortgagor

or attempting to foreclose the mortgage, chose to take possession of the mortgaged premises, which consisted of wild lands, and had a part of the land cleared. The claim of the mortgagee to be allowed for what he had thus expended, was rejected. In noticing this case in his Commentaries, Chancellor Kent says: "The clearing of uncultivated land, though an improvement, was not allowed in *Moore v. Cable*, on account of the increasing difficulties it would throw in the way of the debtor to redeem. But," he adds, in the same connection, "lasting improvements in building have been allowed in England, under peculiar circumstances, and they have sometimes been allowed in this country, and sometimes disallowed." (4 Kent Com. 167.) In a note at the same place it is further added that "all the cases agree that the mortgagee is to be allowed the expense of necessary repairs, and beyond that the rule is not inflexible, but it is subject to the discretion of the court, regulated by the justice and equity arising out of the circumstances of each particular case." Accordingly, in a recent English treatise (Coote on Mort. 354) it is said to be the duty of the mortgagee in possession to keep the premises in repair, and he will be allowed the charge of permanent improvements. And Hilliard, in his Treatise on the Law of Mortgages, after noticing the general rule on the subject, says: "The rule refusing the allowance of lasting improvements has been subjected to some exceptions in special cases, as where the mortgagee makes such improvements supposing himself to be the absolute owner." In support of this proposition he cites the language of the chancellor of Maryland in *Neale v. Hagthorp*, 3 Bland Ch. R. 590, where it is said: "If the mortgagee has been long in possession, claiming adversely, and suffered to treat the estate as his own, and the mortgagor stands by and permits lasting improvements to be made, he shall pay for them." (Hilliard on Mort. 297.)

In the case before us, the premises had been held, under the statute foreclosure of 1846, for more than six years before Dillaye purchased. The possession had been continued and undisturbed. The silence of the plaintiff for this long period had encouraged the belief that those who had the property in possession were the true owners. Dillaye purchased, not as the assignee of the mortgagee, but believing that he was acquiring the property as his own. He made the improvements never doubting that he was the absolute owner. The referee has not found that the plaintiff was ignorant of the fact that the premises had been sold upon the foreclosure, or that Wheaton and his grantees were in possession under that sale. All he finds on this subject is that "during the erection of the improvements the plaintiff was absent from Onondaga, and

there was no evidence that he was aware of the fact while the improvements were progressing." The plaintiff having so long acquiesced in the adverse possession of the premises, himself contributed to the mistake under which the defendants acted. Had no improvements been made, there is no reason to believe that he would ever have asserted his right to redeem. Under such circumstances, he should not be allowed, in a court of equity, to enrich himself at the expense of one who has acted innocently. The improvements are a substantial benefit to the property, and, if he would redeem, he ought, *ex æquo et bono*, to pay for them to the extent of such benefit.

The plaintiff has found himself under the necessity of resorting to a court of equity to enforce his right. He has thus placed himself within the range of that great principle, that he who seeks equity must himself do equity. The improvements were made in the full belief that the plaintiff had no right to the property. That belief has, to some extent, been induced by the apparent acquiescence of the plaintiff in the adverse possession of the defendants. If now the plaintiff, after so great delay, will assert his right to redeem, and invoke the aid of a court of equity to enforce that right, he should be required to make equitable compensation for the benefits he will receive from the improvements. To refuse such compensation, instead of doing equity, would produce the most revolting injustice. (2 Story's Eq. Jur., § 799, *id.*, § 1237.)

COMSTOCK and PRATT, Js., did not sit in the case; all the other judges concurring,

Judgment modified and account ordered to be re-stated.¹

¹ "When, as in this case, a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments and for such improvements, according to the just and enlightened principles of courts of equity."—*Per Grover, J.*, in *Miner v. Beekman*, 50 N. Y. 338, 345 (1872).

The doctrine of the leading case is everywhere accepted, the improvement being reasonable and "judicious." *Gillis v. Martin*, 2 Dev. Eq. (N. C.) 470 (1833); *McConnel v. Holabush*, 11 Ill. 61 (1849); *McSorley v. Larissa*, 100 Mass. 270 (1868); *Harper's Appeal*, 64 Penn. St. 315 (1870); *American Buttonhole Co. v. Burlington Loan Assn.*, 68 Iowa, 326 (1886). But see *Miller v. Curry*, 124 Ind. 48 (1889), in which it is curiously limited, and compare *Barnett v. Nelson*, 54 Iowa, 41 (1880).

Same to above case.
Holds if think he is owner because deed etc. & time for redemption (= notice) expired that not suff. Must be some sort of foreclosure proceedings that were in effect. Case Error.

Held not liable for damage done by letting mill property get out of repair tho' that he was owner. Order any mistake made.

McCUMBER v. GILMAN.

SUPREME COURT OF ILLINOIS, 1854

(15 *Ill.* 381.)

Calvin McCumber, the ancestor of the complainants, on the fourth day of August, 1842, purchased from Joel Walker, lot two in block seven, in Walker's addition to Belvidere, for \$100, and took a bond for conveyance of the lot, on payment of the money in one and two years, with interest, payable annually, for which McCumber gave his notes. McCumber paid the first of these notes and a part of the other before his death. McCumber borrowed of Gilman \$600 in Illinois internal improvement script, drawing interest; to secure the repayment of which, with interest at three per cent. per annum upon the \$600, he gave his note and a mortgage on the lot in question. This note and mortgage were made after the last note given for the payment of the lot had become due.

On the 16th of August, 1845, McCumber died intestate, leaving a widow; and the complainants, his heirs, returned to probate court \$125, which was set off to widow. The estate owed debts, as proved, amounting to \$220, not including the notes to Walker and Gilman. The mortgage to Gilman was acknowledged and recorded in September, 1844. After death of McCumber, Gilman sued out *scire facias* to foreclose his mortgage, and took judgment in April, 1846, for \$240. The premises in question were sold on this judgment for \$393.07, and Gilman became the purchaser; the redemption expired, and Gilman took a deed from the sheriff. Walker, by order of a decree in chancery, conveyed the lots in question to Gilman. In the spring of 1849, Gilman made improvements on the premises by removing a wooden building, variously estimated from \$25 to \$100, and erecting a new building in its place; by laying new floors, putting on blinds, &c.

The decree was rendered by J. G. Wilson, Judge, at April term, 1854, of the Boone Circuit Court.

CATON, J. The case of *McCumber v. Gilman*, reported in 13 Ill. 543, disposes of all claim which the defendant could assert under the judgment of foreclosure, which was there reversed, and leaves him simply in the position of a mortgagee in possession for condition broken, and leaves nothing to be decided in this case except to determine how much he shall be entitled to for repairs or improvements which he has put upon the premises during his possession. The rule on this subject has been as well settled by this court as its nature will admit. It is not only the right, but it is the duty of the mortgagee in possession, to put upon the premises all necessary

In several of the cases allowing outgoes to
recover for improvements where he B.F.
thought he was owner, are statements or
adjectives to effect that improvement
must be judicious or reasonable. If
true rule is kept in mind such
statements become unnecessary. Outgo
should only recover for actual bene-
fit conferred on outgo. No extent
that improvement was injudicious
it wd confer a less benefit so
outgo shd be liable for less. But
it is probably wd not be held that
if one put a 10000⁰⁰ Hdg on premises
which was injudicious because lot
did not warrant it, but which
benefitted outgo 4000⁰⁰ that outgo
cd recover nothing. Of course
lack of authority on pt not sur-
prising. But use of phraseology
found is bad.

Then in our case It said im-
provement must be judicious or
reasonable from standpoint of pt.
That is right if understood & ap-
plied rightly. An improvement
that might be a benefit to A
may be a detriment to B. A
house is painted. If outgo is poor
& expects to ~~continue~~ occupy that
old house the painting is a bene-
fit. If he is rich & just about
to tear it down & rebuild the
painting is no benefit. To that
extent the peculiar position of
outgo shd be considered. Did

our Case apply the princ. rightly?
Seems not. Poor house was more
Expensive than outgoers cd afford
but? is did it Confer any bene-
fit on them Considering their cir-
cumstances. Inquiring is, Suppose
they get land back w.o. paying
at all for improvements are they
really in pocket any? If they
are, how much? That amt shd be
allowed to outgoers for improvements.
Hardly Conceivable that Poorhouse
wd not ~~but~~ benefit outgoers at all.

and proper repairs to prevent them from going to waste, and to reimburse himself out of the rents and profits, unless, indeed, the condition of the premises would make it injudicious to make such repairs. Circumstances might exist where it would be better for the estate to abandon the improvements altogether, than to repair them. In such a case, the court could not sanction an expenditure thus injudiciously made. But the rule does not admit the mortgagee in possession to make new improvements at the expense of the estate; although circumstances may exist which will authorize the court, in stating the account, to allow the mortgagee for new improvements which he was in strictness not authorized to make at the expense of the mortgagor. (McConnel v. Holabush, 11 Ill. 61.) In that case an allowance was directed to be made for new improvements, provided certain facts should be established upon a further hearing. The facts further to be established were indicated in the opinion of the court, as follows: "Were we convinced that the improvement was made in good faith, the defendants believing they had made a valid purchase of the premises, and that the expenditure was a judicious one for the benefit of the estate, we think they should be allowed for them." In this case there is no doubt that the improvements were made in good faith, the defendant believing that he had made a valid purchase of the estate, and that he was expending his money upon his own absolute property. He purchased it under a judgment of the circuit court foreclosing this same mortgage, and after the time allowed for redemption had expired he took a sheriff's deed, and we have no reason to doubt that he supposed his title good. Under this supposition he made the improvements, and with himself as owner, it may be very true that the improvements were quite judicious and proper. But it by no means follows that, counselling the estate as belonging to the heirs of McCumber, the new improvements were judicious and proper. Indeed it is very manifest that they were not, especially as to the new stone house which the defendant erected on the premises. The propriety of the expenditure must be determined with reference to the circumstances of the heirs of the mortgagor, for it was upon their estate that the improvement was made, and it is against them that the expense is sought to be charged. It is a very hard, if not an unjust rule, which in any case makes one a debtor against his will; and it is very clear that it should never be done, unless it is manifestly to his advantage, as well as just and proper as to the other party. Were we to consider the case of Gilman alone, there can be no doubt that he should be compensated to the extent of the enhanced value of the premises by reason of this expenditure; but when we consider the situation and circum-

considering

stances of the complainants, there can be no doubt it would be great injustice to them to impose such a burden upon them. It would be equivalent to denying them any relief whatever. Their father died, leaving no estate whatever to these infant children except this house and lot, incumbered with this mortgage of about \$165, and leaving other debts amounting to about \$220. The value of the premises was about \$500, and were then worth about \$65 a year in rents, but were fast going to decay. The defendant took possession, and not only put the house which was on the premises in thorough, though not extravagant repair, but he put a new fence upon the lot, and removed a wooden kitchen which was attached to the back part of the brick house, and worth from \$25 to \$50, and in its place erected a new stone house, at an expense in the whole of about \$1,200, which he now insists the defendants shall pay him before they shall be allowed to redeem the premises from the mortgage which their ancestor agreed to pay him, and to satisfy which alone he had a right to take the possession. The case has to be but stated to show, that to allow it is equivalent to depriving the heirs altogether of their rights and interests in the premises; for it is perfectly manifest, that it is utterly out of their power to redeem the estate from the mortgage and to pay for these improvements. No court, and no judicious individual having charge of the estate and interest of these infants, could have sanctioned such an expenditure at the time it was made, knowing that it was to be charged to them when they should come to redeem, and knowing that they had nothing in the world with which to pay it. The improvements must have been proper and desirable as to them and in their circumstances, before they can be pronounced judicious and the estate charged with them. And at least as to the new house or addition, and the new fence, we are of opinion that the rules of law do not admit of their allowance. The defendant's claim for improvements is not a matter of strict right, and hence to determine its justness we must consider the position of the other parties; and when this is done, we see at once that to enforce a claim against them for benefits which have been volunteered to them, and to which they have never given the least encouragement, would, in all probability, deprive them of a clear right, without any fault or act of theirs. We are of opinion that the court erred in requiring the complainants to pay to the defendant the value of the new improvements which he placed upon the premises while they were in his possession. There is serious doubt whether even the repairs put upon the brick house were not more extensive than were strictly necessary to preserve the estate from waste and make it tenantable, and more than were strictly judicious, when we consider the cir-

Case clearly O.K. Mtgee acted in
good faith, - thought he was absolute
owner. Mtgor's lack of objection
to the prominent served to aid that belief. Mtgor
trying to take unfair advantage.
Equity - properly refused him re-
lief.

cumstances of the complainants; but upon the whole we have thought it proper to direct that they should be allowed to the defendant in taking the account. I have looked through the evidence with some care, with the hope of being able to make up a satisfactory account between the parties, and thus save the expense and trouble of another reference, but find that I am unable to do so. Hence we must confine ourselves to laying down the principle upon which the account should be stated. The suit must be remanded, with directions that the defendant be allowed the value of the repairs placed upon the brick house alone, including the cellar and well, and also all taxes paid by him upon the premises, as well as the amount due upon the mortgage. The evidence in this record does not show that he has paid the balance due from McCumber for the purchase of the lot. Should he establish by proof that he made such payment, prior to the time when he obtained the title from Walker, he should be credited with the amount thus paid and interest thereon from the date of payment. If he has kept the property insured, for that he should be credited also. He should be charged with the value of the rent of the premises, exclusive of the new improvements which he has put upon them and for which he gets no allowance in making up the account. The value of the rent is to be estimated of the premises with the repairs for which he receives a credit. The rents to be applied in extinguishment of the taxes paid, repairs, &c., first, and, should any balance remain, then towards the interest due upon the mortgage, and then the principal; annual rests being made in computation. Or, if the amount paid for taxes, repairs, &c., should exceed the value of the rents, interest may be allowed upon the excess. No charge to be made for the wooden shed or kitchen removed.

The decree must be reversed, and the suit remanded, with directions to the Circuit Court to proceed conformably to the principles of this opinion.

Decree reversed.
Def't utterly thought he had good title & made improvements in clearing land & building barn with 3000. all told. Not for had refused to buy back premises at true value.

MORGAN v. WALBRIDGE.

SUPREME COURT OF VERMONT, 1883. *Knew of impropr.*

(56 Vt. 405.) *court being made & made no objection when made*

Bill in chancery to redeem certain mortgaged premises in the possession of the mortgagee. Heard on bill, answer and the report of a special master, March Term, 1883, Essex County. Ross, Chan-

realese. Held. Cannot without paying for improvement. Must do Equity.

cellor, decreed that the orator could redeem by paying \$329.81. The chancellor stated that in his judgment this case was exception to the general rule that a mortgagee in possession could not improve the mortgagor out of his estate.

The master found, that the balance due from the orator on the bank notes, money paid to Ingalls, etc., was \$229.81; that the use of the premises while occupied by the defendant was \$200; and that the value of the land was enhanced \$300 by reason of the improvements. It was a part of the decree below that the defendant, on payment of the \$329.81 by the orator, should deed back and surrender the bank notes which had not been fully paid. The other facts are stated in the opinion.

Bates & May for the orator.—The court will treat the deed as a mortgage. (*Wright v. Bates*, 13 Vt. 341; *Hills v. Loomis*, 42 Vt. 562.) The note which H. & W. signed as sureties is not at present paid. (*Reed v. Gannon*, 5 N. Y. 348; *Strike v. McDonald*, 3 Harr. & G. 191.) The improvements are not of such a character as to warrant an allowance of the same. The master makes no finding as to whether any of the improvements were reasonably necessary and proper; if not so found the court cannot infer that they were so. (*Saunders v. Frost*, 5 Pick. 259; 2 Jones Mort. 1129.) The charge for clearing the land is not allowable (*Moore v. Cable*, 1 John. Ch. 385; *Morrison v. McLeod*, 2 Ired. Eq. 108; 2 Kent Com. 334; *Sanders v. Wilson*, 34 Vt. 318;) nor the charge for building the barn. (*Russell v. Blake*, 2 Pick. 505; *Reed v. Reed*, 10 Pick. 398; *Beckman v. Wilson*, 10 Reporter, 554.)

Nichols & Dunnett, for the defendants.—Defendant concedes the general rule that a mortgagee cannot improve the mortgagor out of his estate; but this case is a plain and well-recognized exception to the rule. A mortgagee in possession making improvements upon the mortgaged premises in the belief that his title is perfect is entitled to remuneration for expense so incurred to an amount equal to the enhanced value of the premises. (*Howard v. Harris*, 2 Lead. Cas. Eq., p. 2011; *Whitney v. Richardson*, 31 Vt. 300; 2 Jones Mort. 1128; *Green v. Biddle*, 8 Wheat. 77; 4 Wait Act. & Def. 578; 2 Story Eq., s. 1237, n. 1; 2 Wash R. P., p. 229; *French v. Burns*, 35 Conn. 359.)

The opinion of the court was delivered by

POWERS, J. This is a bill to redeem certain mortgaged premises now in the possession of the defendant Walbridge as mortgagee, and encumbered by a mortgage executed by Walbridge to defendant Chase. The right of redemption as against Walbridge is conceded; and the master reports that Chase took his mortgage with notice of the orator's equity, and thus the right of redemption exists in

favor of the orator against him. The question in hand is, what shall the orator pay as the price of redemption?

Hill & Walbridge were sureties for the orator on sundry notes to various banks, and to indemnify his sureties, the orator, August 29, 1876, executed to them a quit-claim deed of the premises in question. This deed, though absolute in form, was in fact a mortgage, and an equity of redemption under it remained in the orator, to all intents and purposes, as complete and perfect as though it had been in form a mortgage. Hill & Walbridge failed, and, among other conveyances in the adjustment of their affairs, in the fall of 1876, conveyed the premises in question to Ingalls, in trust for their creditors;—Ingalls, however, taking such conveyance with notice of the orator's equity. In the spring of 1878, the orator was notified that Ingalls was about to sell said premises, and that the orator could have them for \$100. The orator declining to purchase, Walbridge, his co-surety Hill having died, procured one Tilton to take a conveyance and pay \$100, Walbridge furnishing the money. This conveyance was on April 23, 1878. This money was paid out for the orator's benefit on his notes upon which Walbridge was surety, and for taxes.

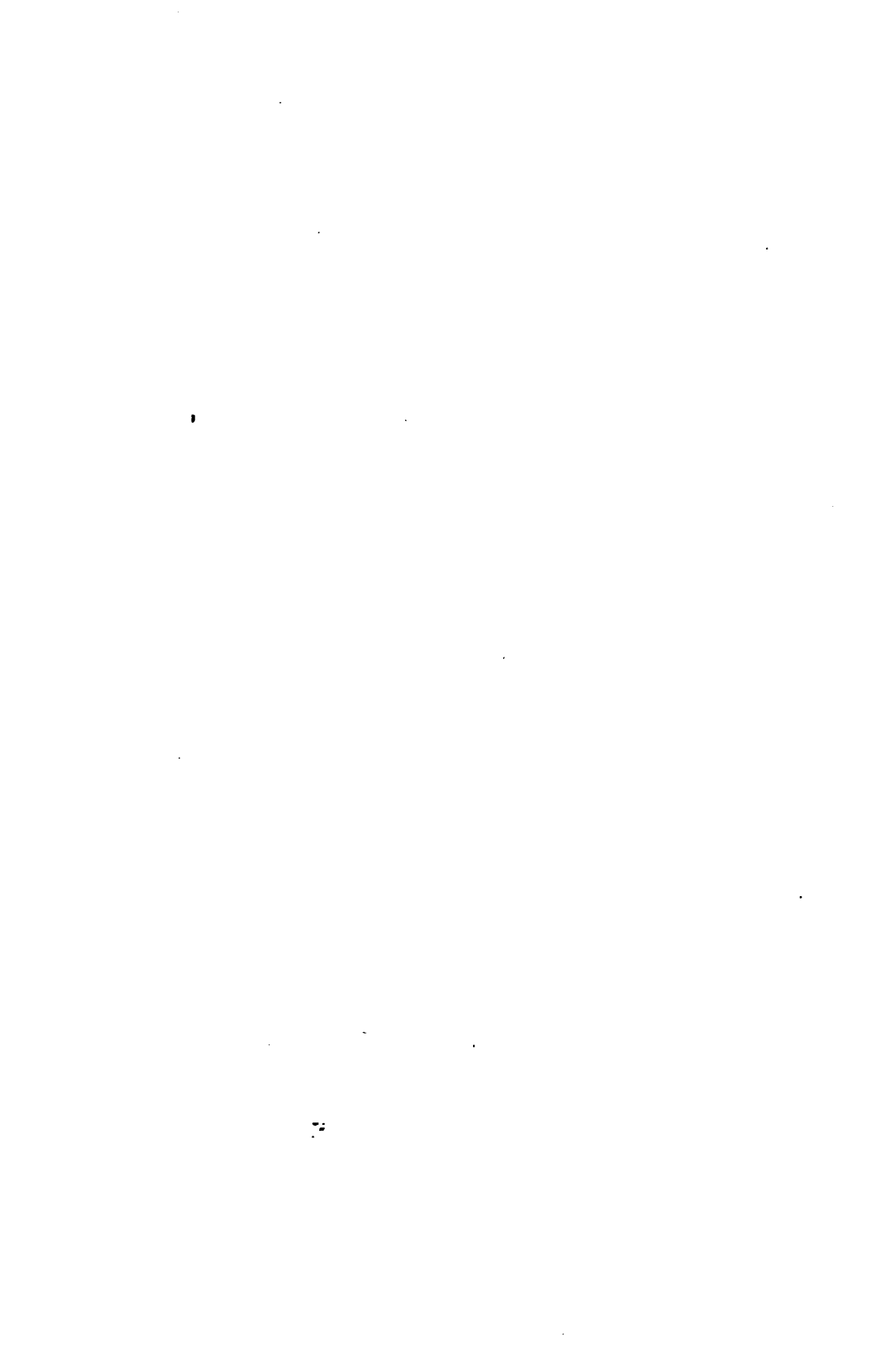
Dec. 9, 1878, Tilton quit-claimed the premises to Walbridge, and on the same day Walbridge mortgaged the same to defendant Chase. At the time of the conveyance to Hill & Walbridge by the orator, and until Walbridge made the improvements herein-after described, the land was of comparatively little value without a considerable expenditure of labor and money. The wood and large timber had been taken off, and it had run up to sprouts and bushes, so as to make it a difficult and expensive piece of land to clear. From the master's report it is apparent that the land was in no condition to yield any income, and could only be made valuable by being burned over, grubbed and fitted for cultivation.

Walbridge, after the orator declined to take a conveyance from Ingalls and pay \$100 (which the master finds was the value of the premises at the time), supposed, when Ingalls sold to Tilton, and Tilton to him, that he had secured a good title to the land, and the orator's equity of redemption was extinguished. Thereupon, in the belief that he had a good title, he went on and made permanent and valuable improvements upon the land, in the years 1879, 1880, 1881, and 1882. He cleared up the land, smoothed the surface, built fences, and erected a small barn. All his improvements were in kind and character, such as good husbandry required, such as alone made it valuable, and such as a prudent owner would have made. The orator knew of the improvements as they were from time to time going on, and made no objection thereto, and asserted

no right or wish to redeem until the summer of 1881, when, through O. F. Harvey, he communicated to Walbridge his desire to redeem. In March, 1882, the orator offered to pay Walbridge \$125, and called on him for a deed. At this time, and when Harvey interviewed Walbridge in 1881, the improvements had been substantially all made, costing Walbridge about \$375, and enhancing the value of the premises, as the master reports, \$300.

Are these improvements chargeable to the orator on redemption?

The general rule is conceded, that a mortgagee in possession without foreclosure cannot improve the mortgagor out of his estate. The mortgagee is not in possession as owner, but as a quasi trustee, to keep the premises in proper repair, carry them on according to the rules of good husbandry, and apply the rents and profits to the extinguishment of his mortgage debt. As a general proposition, lasting improvements cannot be made at the expense of the mortgagor, if he elects to redeem. But it is a rule of general application in courts of equity that he who *seeks* equity must *do* equity. It is obvious that the orator had no interest to redeem the premises before the improvements were made; and, upon foreclosure brought, he would, doubtless, have declined to redeem. He had declined to take the title at the actual value of the land. It was only after the improvements had made the land of productive value that he discovered a wish to redeem. He was not improved *out* of an estate, but was improved *into* one. He stood by in silence, and saw the improvements going on, and now, when the land has been made of practical value, seeks to reap the benefit of such improvements by paying its original value with interest. This proposition is too unrighteous to meet the approval of a court of equity. The case is not that of a farm already in a condition to be carried on, like *Sanders v. Wilson*, 34 Vt. 318; nor that of wild land, like *Moore v. Cable*, 1 Johns. Ch. 385; but it is the case of land partially subdued, requiring further expenditure to bring it to productive value. The rule forbidding an allowance for permanent improvements is not an inflexible one, but is suspended in exceptional cases, if justice and the equity of the case require it. (4 Kent Com. 167 and note.) Such allowance has been made where the mortgagee has acted in good faith and under the mistaken notion that the right of redemption has been barred (*Benedict v. Gilman*, 4 Paige, 58); and where the mortgagor has been slow to act and has thus led to a false impression by his silence (*Mickles v. Dillaye*, 17 N. Y. 80); and where the mortgagee makes the improvements supposing he is the absolute owner (*Hill, Mort.* 297); and where the mortgagee has been long in possession and suffered to treat the estate as his



tenant is not liable for rental value of land but only for what he ed by some degree of care have made out of it. If he actually occupies then he is liable for rental value.

Hughes v. Williams.

- (1) Is a outgor bd to use ordin. care or is he liable only for reckless conduct of premises? Ordin. care often expressed as being that of a provident owner is required. Our case did not put it strongly enough.
- (2) No doubt lack of notice from outgor that a better rent cd be obtained is strong ev. that was no neg. in outgor in not obtaining it, ~~if~~ especially if outgor is near at hand or does know about matter as he usually would.
- (3) As to opening up new profits = here the issue of quarry. Must not do that

own, and the mortgagor stands by and in silence permits the improvements to be made (*Neal v. Hagthorp*, 3 Bland Ch. 590).

When the mortgagee has been lulled into the belief that the right of redemption has been barred or abandoned, and the mortgagor, knowing, or having reason to believe, that the mortgagee supposes that he is the absolute owner, stands by and sees the mortgagee make lasting improvements upon the land, in kind and character such as the land in its condition and wants clearly requires, and which are obviously sanctioned by the usages of good husbandry and faithful stewardship, then the right to redeem will be burdened with the expense of such improvements.

This rule is well fortified by authority, and is securely grounded in reason and justice; and this case is one proper for its application.

*Decree affirmed.*¹

(b) *Rents and Profits—Annual Rents.*

ANONYMOUS.

HIGH COURT OF CHANCERY, 1682.

(1 Vern. 45.)

A mortgagee shall not account according to the value of the land, viz. He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his wilful default: as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

Mortg. need not accept a higher rent if other c's can be shown, desirability of tenant, protecting ansan, avoiding the dividing of estate, not making it unproductive.

HUGHES v. WILLIAMS.

HIGH COURT OF CHANCERY, 1806.

(12 Ves. 493.)

Exceptions were taken by the defendant, a mortgagor, to the Master's report: first, that the Master had charged the plaintiff, a mort-

¹ Valuable and lasting improvements allowed out of the rents and profits if made with the knowledge of mortgagor and without objection from him: *Montgomery v. Chadwick*, 7 Iowa 114 (1858).

all. From my master's report, that mortgagor gave no notice that better could be done that is important. Mortg. need make no speculation in purchasing a opening a state quarry.

gagagee in possession personally, and by a receiver under his appointment, with the rents actually received: whereas he ought to have been charged, according to the circumstances in evidence, with the improved rents, at which the estates had been since let by the receiver appointed by the Court, and which ought to have been obtained by the plaintiff, or his receiver, but for their wilful neglect or default. Another exception was, that the Master had allowed the plaintiff the sum of 68*l.* for the expense of opening a slate quarry: the defendant contending that it was an illegal and improper act; and the only benefit accruing to the estate thereby being the sum of 2*l.* charged to the plaintiff's account, as the produce of the slates. The defendant was out of possession long before the plaintiff entered, prior mortgages having been in possession, whom he paid, to prevent foreclosure.

THE LORD CHANCELLOR [LORD ERSKINE]. I do not mean to say that to charge a mortgagee in possession actual fraud is necessary. It is sufficient if there is plain, obvious and gross negligence, by not making use of facts within his knowledge, so as to give the mortgagor the full benefit that the mortgagee in possession of the estate of the mortgagor ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was under-let, takes a new tenant, another person offering more; an offer, however, not to be accepted rashly. But this case does not furnish even that ground; for with the exception of a proposition to give 7*l.* a year for one tenement, instead of 5*l.* a year, the rent then paid, there is no proof of any proposal for an increase. A reason also is assigned for not accepting the proposal in that instance; that the tenant was in arrear, and the plaintiff was apprehensive of losing that arrear; and there is more difficulty where the estate consists of a number of distinct tenements.

Another circumstance that weighs with me is that the mortgagor, if he knows the estate is under-let, ought to give notice to the mortgagee, and to afford his advice and aid for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the Court might take a stricter view of the mortgagee's conduct. In this instance not only such notice was not given, but during this whole period of 16 years, while the mortgagor was out of possession, he never stated that the estate was not managed as it might be.¹ Can the mortgagor lie by, not giving notice that a greater rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence? I agree to

¹ Compare *Moshier v. Norton*, 100 Ill. 63, 72 (1881).

unless promises are an inadequate security. If he does, he can recover nothing for what he spent in doing so. ~~Prob. he is liable for any damage to person from doing so.~~

(1) This represents gen'l rule that all outgee
has to do is to exercise ordin. care to
get as much out of premises as
pos. Only liable for occupation rent when he elects to occu.

(2) So far as it indicates that he need
not occupy premises personally it
seems right. ~~But see next case.~~
~~He did cultivate land here - but~~
~~didn't occupy house.~~

the principle that has been stated by the Solicitor-General, that it would be dangerous to say the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross negligence can be shewn as comes up to the description of wilful default, he ought to be answerable for it.

But I determine this exception upon the principle that a mortgagee, taking possession, is to take the fair rents and profits, and is not bound to engage in adventures and speculations for the benefit of the mortgagor, but is liable only for wilful default, of which in this instance there is no pretence, this mortgagor not having even communicated that he had any contemplation of improvement or proposed tenants. It would be most dangerous to entangle mortgagees in a minute inquiry, whether some person would have given more, which was never communicated.

Upon the same principle on which I determine the first exception in favour of the mortgagee, I must determine the other exception against him. The principle is the safety of mortgagees. The line cannot be drawn. How can it be ascertained that the mortgagor will want a slate quarry? The amount is in this instance inconsiderable, but the principle would reach the case of a mine. The mortgagee, therefore, having engaged in this speculation, must speculate at his own hazard.

The first exception was overruled, and the other allowed.

Plt's judge had not eq't, taken pos, and had cultivated land himself. He had no chance to get hence. Living off land he did not make a much out of
 FELCH v. FELCH. *it is a reasonable*
 COURT OF CHANCERY OF VERMONT, 1845. *rule. He'd only be liable*
 (9 Law Rep. 217.) *for what he made. He*

This was a bill of foreclosure against the mortgagor and others, subsequent incumbrancers. The bill was taken as confessed, under a rule that the defendant should have the same right to call the plaintiff to account before the master for all rents and profits of the mortgaged premises, for which he was liable, as if the defendants had filed a cross bill; and that the plaintiff in his turn should have the same rights in accounting as if he had made answer to the cross bill. It was accordingly referred to one of the masters of the court to state the sum due in equity. The only questions raised upon the master's report were in regard to the liability of the plaintiff for rents and profits while he had been in possession of the premises during the last year. In regard to this the master re-

must be prudent, that is all.

ported the following facts: The plaintiff, before he took possession of the premises, which consisted of a farm and small tenement, brought ejectment against the mortgagor, and recovered judgment for the seisin and possession of the premises, which the mortgagor having abandoned, the plaintiff took possession, and personally occupied the land and cultivated it in such manner as he best could, living at some distance from it, and having no opportunity to rent the house. The master reported that in consequence of the plaintiff's living at some distance from the premises and conducting his agricultural operations at some disadvantage on that account, and not occupying the house, he did not derive as much benefit from the use as what would be considered a reasonable rent for the premises for one who resided thereon, and referred it to the court to determine for which of two sums so fixed the plaintiff was liable in equity.

After argument by *Paddock* for the plaintiff and *Underwood* for the defendants

THE CHANCELLOR, REDFIELD, delivered the following opinion:

The importance of this question, rather than the amount here involved, and the consideration that bills of foreclosure are not ordinarily appealable from this to the Supreme Court, has induced me to examine this case with more care than I should otherwise have done. I think it obvious that the mortgagee, under the circumstances of this case, cannot be made liable for anything more than the *actual profits*. And this, I think, may be shown by the oath of the plaintiff in support of his account of disbursements and receipts. For in regard to the rents and profits of the mortgaged premises, while he occupied them he is strictly a defendant, and the accounting party. The regular course in such case would be for the defendants to file a cross bill, calling upon the plaintiff to state the amount of rents and profits, which strictly he should do in his answer to such cross bill; but the same result was here attained by the rule under which the bill was taken as confessed.

But the defendants objected not only to the mode of trial before the master, but also that the plaintiff should, while personally occupying the premises, be made liable for a *reasonable rent*, without reference to his actual receipts. This latter objection deserves a more extended consideration, perhaps, in consequence of its general importance.

1. Upon principle it is difficult to perceive why the mortgagee, who takes possession of the premises while vacant, and long after his debt becomes due, should be held to any stricter accountability than other trustees. It is the fault of the mortgagor, in the first instance, that the debt is not paid, and that in consequence

Eq. A.

"the mortgagee is compelled to take possession. 2. It is contrary to the contract of the parties, and to the ordinary expectation in such cases, that the mortgagee should be compelled to resort to the land for the payment either of his debt or interest. 3. If there are subsequent incumbrancers, who are ultimately and principally interested in the avails of the security, it would seem more their duty than that of the first mortgagee either to remove the first incumbrance, and thus take the control of the premises, or else to find a tenant who will render a reasonable rent. Under such circumstances, to require of the plaintiff more than ordinary diligence would seem manifestly unreasonable and unjust. In ordinary trusts the trustee is held only to common diligence, or such as men ordinarily exercise in their own affairs, and to account in that way for the profits actually received from the trust estate, or which might have been received but for the neglect of such common diligence.

In looking into the books I think no doubt can be entertained that such has been the general rule in regard to mortgagees in possession ever since the time of the case in 1 Vernon, 45 (1682), which as it is very brief, and seems to form the basis of the subsequent decisions upon the subject, may be here excused. "A mortgagee shall not account according to the value of the land, viz.: He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his wilful default; as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant, that would have given so much for it." There is in the present case no pretence that the plaintiff turned out or rejected a tenant, or that one could have been found, or that, under the circumstances under which he came on the premises, he could have realized more than he did. He must, then, I conclude, according to the case from Vernon, be liable only for what profits *he actually did receive*. This case is followed almost in terms by Ch. J. Swift, 2 Dig. 193, 2 Powell on Mort. 272; by Chancellor Kent, 4 Comm. 166, and in *Hughes v. Williams*, 12 Vesey, 493, and in Mr. Perkins's note to this last case, where all the modern authorities are collected and digested. That this is the general rule of the liability of trustees cannot be denied. The exceptions to this rule, where trustees have been made liable for rents and profits which they *might* have received but for their own wilful default, will not affect the present case. (*Loftus v. Swift*, 2 Scholes & Lef. 656; *Duke of Buckingham v. Gayer*, 1 Vernon, 258; *Chapman v. Tanner*, *Id.* 267; *Coppring v. Cooke*, *Id.* 270; *Williams v. Price*, 1 Simons & Stuart, 581.)

The cases which have been cited to show that a mortgagee who

personally occupies the premises, is liable for a reasonable rent are not like the present. Where the premises consist of a tenement and out buildings which are occupied by the mortgagee, or where the mortgagee refuses a tenant who will pay a reasonable rent, no other rule could be adopted but to make him accountable for a reasonable rent; so also he should be accountable for a reasonable rent when he manages the premises unskillfully by reason of which they become unprofitable to him. (*Van Buren v. Olmstead*, 5 Paige, 9; *Bainbridge v. Owen*, 2 J. J. Marshall, 465). And in some cases, when the premises had suffered deterioration while in the possession of the mortgagee by his default, such damage has been ordered to be deducted from the mortgage debt. (*Kennedy v. Baylor*, 1 Washington, 162). But none of these exceptions affect the present case. The orator is entitled to a decree for the amount of his mortgage debt, deducting the amount of profits actually received by him.¹

Mtge took pos of farm with house &c. When he cd he rented it. Other years it lay idle. (Kd Mtge must show (has b/prov) that he was diligent

SHAEFFER v. CHAMBERS.

COURT OF CHANCERY OF NEW JERSEY, 1847.

(2 Halst. 548.)

THE CHANCELLOR [HALSTED]. On reading the testimony, I *tilld.* do not see any good reason why the report of the Master should not be confirmed. A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it, and of using the same diligence to make it productive that a provident owner would use. If it be a farm, he is not at liberty to let it lie untilld because the house on it, or the house and farm together, were not rented. I see no reason why the farm should not be husbanded, though the buildings on it were not rented. Again, a mortgagee in possession is not at liberty to permit the property to go to waste, but is bound to keep it in good ordinary repair; and if it be a farm he is bound to good ordinary husbandry.

It appears by the testimony that, for several years of the time during which the defendant has been in possession, the property was not rented, and the whole of it, farm and all, was permitted to lie uncultivated. The Master reports that it was not made

¹ The authorities generally are accord: *Robertson v. Campbell*, 2 Call (Va.) 421 (1800); *Hogan v. Stone*, 1 Ala. 496 (1840); *Gerrish v. Black*, 104 Mass. 400 (1870); *Moshier v. Norton*, 83 Ill. 519 (1876); *Moshier v. Norton*, 100 Ill. 63 (1881).

Seems only case on particular point
that if outgo premises are a farm
that outgo must have it Cultivated
if he cannot rent it. Perhaps it
does not involve point. Master re-
ported that during 1828-9 rent it did
not appear that less of rent was
not due to deft 150 he charged
him with rent. "if they did not
produce the same annual rent,
that said loss was not occasioned
by the default of the deftendant"---
So perhaps cd go on & rd that deft
unreasonably failed to rent prem-
ise. But dictum - that must
cultivate. Seems right. Principle
is that outgo must use reason-
able care to get as much out
of premises as pos. Ho let a
large farm lie absolutely idle is
hardly that.

Perhaps count hardly talking about
b/pr. tho uses terms. Seems absence
of authority as to b/pr. Would put
it on outgo a neg. more easily
proved than due care. But that
idea not so applicable here as not
a single or a few acts but conduct
of a continuous nature easily proven.
Perhaps arg. that outgo knows the
facts but shd put burden on him.

satisfactorily to appear to him that the property was thus unoccupied without the default of the defendant. The ground here taken by the Master raises this question: a farm of 85 acres, 25 of it in wood land, under mortgage, is taken possession of by the mortgagee and rented. He remains thus in possession a number of years. Occasionally during this period the premises are vacant and the farm untilled. Is it sufficient for the mortgagee, thus in possession, in order to relieve himself from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them; or should he be held to show proper diligence to procure a tenant? Is the mortgagor to prove that he might have rented it but for his wilful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in 1 Vern. 45; or does the fact of the premises being left vacant throw upon the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in *Metcalf v. Campion*, 1 Moll. 238.

It seems to me that it will not do for the mortgagee, having thus taken possession, to fold his arms and use no means to procure a tenant; and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But, at all events, if the farm and buildings are not rented he ought to cause the farm to be tilled, and that in a husbandlike manner.

From the testimony I think the defendant has been negligent, to say the least, in the manner in which he has treated the premises. No provident owner would have treated them as he has. They have been permitted to go greatly out of repair, and the lands have been so badly husbanded that for several of the last years the whole premises, rented at first by the mortgagee for \$100, have rented for only \$60, and he has been charged but that sum. The defendant, during several years, cut wood and timber from the premises and sold it. The Master, in stating the account, made annual rests when he found that the wood and timber and the rents and profits exceeded the interest and expenses, and applied the income, first, to the interest and expense account, and then to the reduction of the principal. This was objected to on the part of the defendant. It seems to me the Master was right.

I am satisfied with the general result reached by the Master.

Exceptions disallowed.¹

¹ *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9 (1834), accord. Compare *Dexter v. Arnold*, 2 Sumn. 108, 129 (1834); *Miller v. Lincoln*, 6 Gray (Mass.) 556 (1856); *Richardson v. Wallis*, 5 Allen (Mass.) 78 (1862); *Sanders v. Wilson*, 34 Vt. 318 (1861), and *Barnett v. Nelson*, 54 Iowa, 41 (1880).

2. Sumn. 108, 129. Judge kept no log what he got - held chargeable with a fair rent but no ab. rule.

64 May 556. Must let an "almost tenant" remain in p.o.

5 Allen. Ordin rule

34 Vt. When mortgagee himself occupies he must pay rent not profits.

54 Pa. Same as last.

Simply hold that a rent should have been obtained by due care. Shall be charged up.

HOUSE OF LORDS, 1867.

(L. R. 2 H. L. 1.)

P made a utge to C. Later
 he made a 2nd utge to
 BURY. depts. C's utge con-
 67. tained a power of sale
 on, notice to P's representa-
 tions. In 1837 depts toll
 (Sford) :- [His Lordship
 and the decree therein,
 her father, John Farrell
 ber, 1831. He was the
 der a lease for a term of
 ber, 1819. On the 26th
 k and the eight houses in
 of Thomas Chambers for
 contained a power of sale,
 on giving three months'
 administrators. On the
 as assigned by Parkinson
 ants, Truman, Hanbury
 and interest due to them.
 ption, and was clearly a
 re was a trust conferred
 , and out of the proceeds
 rs of £2000, to pay a sum
 nd to pay the surplus, if
 was embarrassed and in
 al Oak public house; and
 ve possession of the house
 the defendants, who were
 d to let the properties.
 B1. On the 7th of June,
 ossession of the premises,
 der these documents, and
 atgoings. The appellant
 ounts; answers were sent
 ervation in reply. What
 and the 9th of October
 ce. On the 9th of Octo-
 er the power of sale con-
 roperty to Hanbury & Co.
 afterwards declared to be

to C. Later
Judge to
Judge Cen.
of Sale
representa
depts toll
pro. as P's
agt to Col
Westvaco.
Ret. In
1831 P. died
In 1834 Tunc
depts gave
up pro to
Hallam
advising
& accounted
for suit Ret
In Ret. 1834
C sold prop
to depts but
Sale was
invalid
under prov.
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title to
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Sustained.
Depts see
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Collected
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C sold prop
to depts but
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invalid
under prov.
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giving no
title to
P's expro.
Execution.
Depts see
two d. ma
file under
Sale how.
Err. They
Collected
bank suit
due since
time ↑

also future rent. Pay, a deed of Park
to redeem. ? is whether defts are liable
for rents they shd have made but for
their wilful default. Held not. ~~the~~
They never had pos as intgrs.

(1) If defts are not to be taken as outgoes in fact, they must be considered as trespassers under mistaken supposition that they had bought. For what red such a person be liable? He would be liable in trespass for entering, the land could be recovered from him in ejectment, then a rent red lie vs him for mere profits. So it seems if Ct has not going to apply outgo rule here shd apply the mere profits rule. What is that? Is it fair rental? What red by case have been obtained? or what in fact has it obtained? The rule vs. a malat fide trespasser is no doubt the rental value of premises + other damages such as injury done premises, etc. Compensation for improvements. But vs a bona fide ~~proprietor~~ ^{trespasser} the rule prob. is that he is only liable for actual receipts + there may be reduced to nothing by showing improvements. — So if Court was right in holding that defts were not to be treated as outgoes in fact then their conclusion that they shd be held only for actual rents & profits received is ~~correct~~ correct.

(2) That one who is in fact a outgoer in fact but does not know it is not to be held up to the obligs of a outgoer in

pos is probably settled. He is to be held to the obligation probably of the state of ownership he thought he had. ^{There} he thought he was owner. Owner does not have to ac to anybody. But dept cannot keep profits - he has actually received as that wd unjustly enrich him. So he must ac for what he actually received.

Such we saw above is also rule as to bona fide trespassers accounting. Discussion above was unnecessary as depts are not held as trespassers but as if they had the estate they thought they had. But it shows that same rule applies to trespassers.

In ^{pos.} other words: (a) one bona fide thinking he has it dif from what he has owes no duty to obtain more profits beyond what he wd owe if his supposed it were actual. but (b) he is liable so far as he is unjustly enriched.

*of the mistake rule in tot. Not ap.
plied in many cases of 9-cent contracts.*

invalid, because it was effected without the three months' notice required by the power of sale contained in the mortgage.

After the execution of the deed of sale, Hanbury & Co. received on the 29th of November, 1834, the half-year's rent due at Midsummer, and on the 10th of February, 1835, the rent due at Michaelmas, 1834, but in what character did not distinctly appear. At this period, and for some time afterwards, there was no legal personal representative of Parkinson. In February, 1845, the appellant took out letters of administration to her father, and in 1848 she filed her bill, alleging (but without specifying items) that the accounts rendered were erroneous, that the respondents had not rendered accounts of the goodwill and profits of the business of the Royal Oak, and praying that the respondents (whom she treated as mortgagees in possession) should render in that character accounts of what they had received, or what, but for their wilful default, they might have received. In 1852 she filed a similar bill, and in 1854, on her own application, the bill of 1848, which the respondents had duly answered, was dismissed. The bill filed in 1852 (amended in August, 1858, and re-amended in December, 1858) prayed for an account of what was due to the respondents on their security of January, 1828, or otherwise charged upon the mortgaged premises in the bill mentioned, that they might be decreed to account for the profits of the Royal Oak, and of the goodwill of the business thereof, received by them or their agents, or which, without their wilful neglect or default, might have been received by them from June, 1828, up to the filing of the bill; and that they might account for the rents and profits of the houses in Radnor Street and Waterloo Street up to the time when the same were taken possession of by Chambers, or to such farther time as the Court might deem fit; also of the timber yard and tenements adjoining, and of the houses in Galway Street and the ground in Coppice Row. And that it might be declared that, notwithstanding the conveyance and assignment of the Royal Oak by Chambers to the respondents, they were trustees or mortgagees thereof—and that the appellant was entitled to redeem the same, and all the other premises then in the possession of the respondents—and for the usual orders thereon, and for farther relief.

See bill to redeem

The respondents put in their answers, affirming the correctness of the accounts delivered, alleging that they had collected the rents in the character of agents, and denying that they ever had received, or been entitled to receive, anything for the goodwill and profits of the business. The cause came to issue, evidence was taken, and it was heard before Vice-Chancellor Kindersley, who on the 7th of

June, 1860, made his decree, by which the bill was ordered to be dismissed with costs, as to the relief sought to be obtained thereby in respect of all property in the pleadings mentioned, except the Royal Oak, as to which it was ordered that an account should be taken of what was due in respect of the security of January, 1828, or otherwise charged upon the mortgaged premises, and for the costs of the suit; and that an account be taken of rents and profits received by the respondents from the 1st of June, 1828, to the present time; and that, upon the appellant paying to the respondents the principal, interest, and costs, after such deductions, and giving credit to them for £1300 and interest from the 9th of October, 1834, they should re-convey, &c. But in default of her making such payment the bill was to be dismissed with costs.

On appeal to the Lords Justices, they on the 15th of January, 1865, affirmed this decree with costs.

This appeal was then brought.

It is against this decree that the present appeal has been brought, and the reasons given for the appeal are: First. "Because by the amended bill of complaint the appellant set out specific charges as being erroneous, and is, therefore, entitled to open such account, even if it was ever closed or settled, and thus obtain an account of the rents received for and in respect of the premises in the first portion of the decree mentioned;" and, Second. "Because the respondents are mortgagees in possession of the said Royal Oak public house, and liable to account as such, and not, as in the decree mentioned, to the appellant as administratrix of the said John Farrell Parkinson, deceased, for the rents and profits of the same, and are, whether in possession as mortgagees, trustees, or agents, liable to account for the profits and proceeds of the business of the said public house."

I will take the second reason of the appeal first. It is very clear that in the peculiar case of a mortgagee who chooses to assert his rights by taking possession of the mortgaged estate, and who is not bound to render any account to the mortgagor if the mortgagor sues for a redemption of the property, the mortgagee who has so taken possession is bound to account, not only for the rents and profits which he has received, but also for everything which he might have received but for his own wilful default. That, I believe, is the only instance in which a person in possession of an estate who is called upon to account is made answerable for that which he might have received but for his wilful default. Therefore it was necessary, in order to lay the foundation for this appeal, to shew that the defendants were actually in possession, and in receipt of the rents and profits as mortgagees. Now it appears

to me that the appellant has entirely failed in establishing this case.

Under the memorandum of the 10th of May, 1828, the defendants were in receipt of the rents and profits, as the agents of Parkinson, and they continued in possession in that character down to the 7th of June, 1834. On the 9th of October, 1834, they came into possession under a different character, as vendees, upon the sale by the executors of Chambers. They received the rents down to the 7th of June, 1834; but, in addition to this, it appears by the accounts that they received the Midsummer rent for 1834, and the Michaelmas rent for 1834, being the rents for a period between their delivering up possession, which they held as the agents of Parkinson, and the time of their becoming vendees under the purchase from Chambers' executors, on the 9th of October, 1834. Now, that sale having been held to be invalid, it is contended on the part of the appellant that these rents, having been received without any right under the memorandum of agency, or any right under the purchase from Chambers, that therefore the only title which the defendants can pretend to for the receipt of these rents must be in their character of mortgagees. But, in the first place, these rents were received, not during the interval between June, 1834, and October, 1834, but the Midsummer rent was received on the 29th of November, 1834; that is after the purchase from Chambers' executors, and the Michaelmas rent was received on the 10th of February, 1835. How is it possible to say that, under these circumstances, the defendants ought to be charged in respect of the receipt of these rents as mortgagees, and that in that character the appellant is entitled to have a decree against them for an account?

It may be, my Lords, that they were not entitled to receive those rents at all: that is putting it in the most unfavourable way for the defendants. It may be that they were entitled, under the contract of sale with Chambers' executors, to those rents, although the purchase deed was not executed until after those rents became due. It may be that they considered that they were entitled to those rents under the purchase deed as back rents. But it is perfectly clear that they never assumed to receive those rents as mortgagees, and, therefore, if it is only where a mortgagee asserts his strong right by entering into possession and receiving the rents and profits, that, when he is called on to account, he has to account not only for what he has received, but also for that which he might have received but for his own wilful default; that principle cannot certainly apply to this case.

My Lords, it appears to me to be impossible to put the case in

the way in which it was ingeniously put by Mr. Darby, that the sale by Chambers' executors having been decreed to be invalid, there was no other title on which the defendants could possibly be in possession except that of being mortgagees, and that, therefore, retrospectively, it must be considered that their possession must be applied to that title as mortgagees, and to no other. I apprehend that it is perfectly clear that that cannot be maintained. . . .

LORD CRANWORTH. My Lords, I think, with my noble and learned friend, that the appellant has completely failed in establishing either of the propositions for which she contends. She says that the Vice-Chancellor first of all, and subsequently the Lords Justices, were wrong in dismissing the bill, so far as it generally sought a decree to account against the respondents as persons who have received money as agents for her, or for her late father, whom she represents; and, secondly, upon the ground that they ought to have been charged as mortgagees for wilful default, whereas they were not so charged. . . .

Then comes the other point, whether or not the accounts which were directed in respect of the occupation of the Royal Oak public house ought to have been directed, charging the defendants both with the receipts and with that which, without wilful default, they might have received. It is meant to charge the respondents with being in receipt as mortgagees upon two grounds. That which was insisted upon mainly was this: that their title, which they acquired under Chambers on the 9th of October, 1834, although supposed by them to give them a title as purchasers, really was a title which only put them in the place of Chambers, and Chambers was merely a mortgagee.

I think that it is perfectly clear law that when a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default. What was the origin of that rule I do not know, and it is not very clear, or very distinctly laid down in the cases; but it seems to me to depend upon this, that the party taking possession must have known that he was in possession as mortgagee. That seems to me to be essential to the rule. Whether it would be correct to say that, under those circumstances, a person who entered into possession not as mortgagee may not afterwards become mortgagee in possession with all the liabilities of a mortgagee in possession, is a proposition which need not be laid down now. It is possible that, by distinct circumstances, it may be

Knowledge
necessary.

shewn that there was an intention to alter the character from the one to the other. But nothing of the sort appears here, and it is perfectly clear that although these respondents were properly treated as parties who had not a valid title as purchasers, because there was nobody who could give a consent to the sale on behalf of the representatives of Parkinson, yet they treated themselves as purchasers having a valid title and supposed that they were in possession as purchasers, and were therefore liable to account only in the ordinary way for the rents.

Then a point was raised to shew that they were mortgagees upon this ground: It seems that they gave up possession as agents on the 7th of June, 1834, and they did not acquire their title as purchasers till the 9th of October, 1834. After they had acquired their possession as purchasers, or supposed purchasers, on the 9th of October, 1834, they received two portions of rent, namely, that which accrued at Midsummer, 1834, and that which accrued at Michaelmas, 1834. Now, it is said that, as purchasers in October, 1834, they could not have been entitled to those rents, because they would only have been entitled to the rent which accrued after they became purchasers. How came they to receive those rents? It is said that, because they were mortgagees under the mortgage of January, 1828, it must be presumed that they received those rents under their title of mortgagees, and not under the purchase from the executors of Chambers.

It appears to me that that would be pushing the doctrine to a most extravagant length. Mortgagees in actual possession they certainly were not, for they only received rents (which is the same thing, however, in point of law), but they did not receive them during the time they were agents, or during the interval between their ceasing to be agents and becoming purchasers; but they received them afterwards, and I take it that they had then no right to receive them as mortgagees. It is certainly too much to force upon persons the character of mortgagees in possession, when they never were in actual possession as such, and never received any rents, except when they had by subsequent arrangement become entitled, as they believed, as purchasers, to the actual possession, or to the actual receipt of rents and profits thence accruing.

It seems to me, therefore, my Lords, that the case entirely fails. It is only very much to be deplored that this lady should have involved herself in this course of protracted and useless litigation. I agree, therefore, with my noble and learned friend in thinking that we ought to follow the Vice-Chancellor and the Lords Justices by dismissing the appeal, with costs.

LORD WESTBURY. My Lords, I have felt some anxiety in this

case, by reason of the form of the decree to account for the rents and profits, and certainly that is a point which deserves some attention on the part of the House. I take the law to be this. It is undoubtedly settled in the courts of equity that if a mortgagee, in that character, enters into receipt of the rents and profits, he will be bound to account not only for what he has received, but for what, without wilful default, he might have received. It is difficult, perhaps, to ascertain the origin of the rule, but I take it to be this—that when a mortgagee, by virtue of his mortgage, claims to receive the rents and profits, he is regarded in a court of equity as the bailiff of the mortgagor. Now an account against a bailiff was, both at common law and in equity, given with wilful default. That is almost the only case, save in cases of fraud or breach of trust, where wilful default is infused into the form of the account. And if the mortgagee is regarded as in the nature of a bailiff to the mortgagor, then it would be proper to give the decree against him, as it is always done against a bailiff with wilful default.

But if that ground is referred to as the foundation of the practice, it must of necessity follow that the party receiving receives in the character to which that relation of bailiff and principal may be properly imputed; and consequently it would follow that if the mortgagee takes in another character, more especially if he receives in a character adverse to the right of the mortgagor, then it would be impossible to ascribe to him, by any inference of law, the conclusion that he intended to take possession, or to receive the rents, as the bailiff of the mortgagor, or that that relation could properly be imputed to him. Supposing that to be the origin of the rule, it will, therefore, not be applicable to any case where the conclusion of the defendant being in receipt of rent as mortgagee is a conclusion consequential only on your having reduced and set aside some other pretended or alleged title, in respect or by virtue of which he had actually received the rents and profits.

The case here is clearly this: The present respondents claimed the Royal Oak, not in the character of mortgagees, but in the character of purchasers of the property from Thomas Chambers, by virtue of his power of sale. In that capacity they entered and enjoyed, and you have to remove that title by decree before you can fasten on them anything like that state of circumstances which would bring them within the character of mortgagees in possession.

But then it was said on the part of the appellant, with much ingenuity, that it appeared that they had actually received some rent which accrued due at a time anterior to the date of the contract of purchase, and that it was impossible to ascribe that receipt to any

other title than a title which they had as second mortgagees. But I do not think that that is a just or by any means a necessary consequence. The fact appears to be, that anterior to the contract of purchase they had been in the receipt of the rents of the Royal Oak, by virtue of an authority which they received from Chambers. Chambers, in fact, had claimed to receive the rents and to have the benefit of the property; and he had exercised that by means of an authority given to the respondents. Supposing that that authority had terminated in the month of June, 1834, anterior to the date of the purchase deed, yet it by no means follows that Chambers had then given up his right or claim to the receipt of the rents. It is impossible, therefore, to ascribe, with any accuracy in point of fact, the receipt of the two sums which actually came into the hands of the respondents in the months of November, 1834, and January, 1835, both of them after the date of the purchase deed, to the title which they might have asserted as second mortgagees, supposing Chambers had abandoned the receipt.

cf. p. 553 ←

I collect, therefore, from the facts that the inference rather would be that these two sums of money, if they were not received by the respondents by virtue of their purchase contract, were received by them still on behalf of Chambers, and not on behalf of themselves, in the character of second mortgagees. There is no room, therefore, for the argument, ingenious as it was, and which might have had some effect, that anterior to their purchase they were *de facto* in receipt of the rents in the character of mortgagees, by virtue of their second mortgage.

Then we come to the question whether the case is affected by the decision in the case which has been very properly cited by the appellant herself this morning, namely, *Neesom v. Clarkson*, 2 Hare, 163. That is a case which is very material, and which needs some explanation, in order to shew that it has not a governing effect upon the case before your Lordships. The case arose under these peculiar circumstances. A man had contracted to purchase a fee simple. He died before he had paid the money. He made his widow his universal legatee and devisee. The equitable estate, therefore, which he acquired by virtue of that contract, passed, under his will, to his widow. His widow married again; and her second husband, supposing himself to be entitled, paid the purchase-money under that contract. He then mortgaged the estate, the estate being one to which he was entitled only *jure uxoris*, save in respect of the lien he had on it by having paid the purchase-money. He mortgaged it, and then conveyed it absolutely to a purchaser, in whose purchase deed, however, there were recitals

stating clearly and distinctly in what character the vendor, that is to say, the second husband, had acquired an interest in the estate. The widow died, and the second husband died; and on the death of the widow, there being no child of her marriage with her second husband, the estate, of course, descended to her heir-at-law. The heir-at-law filed a bill for the redemption of the property, and it was held by the Vice-Chancellor (unquestionably a strong decision) that the recitals in the purchase deed gave distinct notice to the purchaser from the second husband, that all his interest in the estate ceased upon the death of the wife, and that all that he could become entitled to was a claim in respect of the money which his vendor had paid on the original purchase. The purchaser from the second husband claimed to continue in possession. It was held that he had no title to the possession, save in respect of his lien for the purchase-money; and then, certainly by a very strong stretch of the authority of the Court, and of the principle, it was held, that as his purchase deed gave him a most distinct notice of the determination of the title of his vendor, and that he himself had no other claim than in respect of that sum of money which had been paid, his subsequent receipts must be referred to the only interest he had; and accordingly he was charged with an account directed with wilful default.

That approaches very nearly to the present case in favour of the appellant, but certainly stops somewhat short of it, and is distinguishable from it (though, if not distinguishable, I confess I should not have been disposed to recommend your Lordships entirely to follow that authority), because in the case then before the Vice-Chancellor there was nothing to set aside; and it was held that the conveyance, upon the very face of it, was pregnant with information to the party that he had no title whatever, save in respect of his lien for the purchase-money. In the present case there was a question to be determined at the hearing. The question was this, whether the power of sale given to Chambers, which in its terms required notice to be given to the personal representatives of Parkinson, could nevertheless be operative, there being no such personal representative. It was held that it could not, and that the power did not arise, and that the conveyance therefore must be set aside. Although that was very right, yet I think it would have been very wrong if the old rule of the Court, founded on the principle of a mortgagee receiving rents, becoming in that respect the bailiff of the mortgagor, had been applied to a case where the parties clearly had taken the property, under a reasonable conclusion that the purchase deed, by virtue of which they had acquired possession, was a valid transaction, and gave them a *bona fide* title.

(1) In 1st place Court ~~find~~ find that it is not shown that deft failed to cultivate as a prudent owner. Does that prevent deft being liable? No. If mtgze himself occupies & culti. rates he is liable for fair rental. Even tho' he makes less. On grd that what he makes is so exclusively known by him that concealment is easy; & that it also depends so much on his efforts while it is hard to prove that they were not reasonable; it is held that he is liable always for fair rental whe. tho. he used due care or not.

(2) Court go mainly on fact that deft thought himself owner. If that was so, Case is clearly O.K. as being in accord with last case.

Seems very doubtful as a ? of fact. But while deft perhaps threw he was not the absolute owner, yet it is possible he that he was not mtgze but vendor under a cont. of Sale in pro. He shd then be held up to the duties of such a vendor. What his duties are is not clear.

(c) He does not have to pay for rents & profits ^{at all} until after time for performance ^(and) unless possibly when int- begins to run sooner. (and) But from time that int begins to run he must pay usually for rents & profits. As far as cases go his oblg.

Answer: that he occupied for himself seems so but not in my view.

I am therefore, my Lords, of opinion in that respect with your Lordships, that the decree was rightly framed in the form in which we find it, and that the present appellant had no title to have the account directed with wilful default.

Decree and order appealed from affirmed, and appeal dismissed with costs.

Deft said plff bought in farm in foreclosure for her benefit. He took absolute title but agreed orally to convey to her on pay in 1 yr. He took pos but plff had use of house for 3 yrs. Later she deft used house till after. Deft cultivated farm but did not make a house as he might plff seeks to redeem. Deft is only liable for what he made. & for an appeal deft did all a provident owner and do. He took pos not an outgee but as he had it as an owner having given an oral promise to sell back. Rule that outgee is liable for wilful default only applies to formal outgee perhaps.

MORRIS v. BUDLONG, 78 N. Y. 543, 555 (Court of Appeals, 1879). This action was originally brought by Mary Morris for an accounting between her and defendant Budlong, and for repayment of moneys alleged to have been paid to him in excess of what he was entitled to; and to have two mortgages, one executed by plaintiff to one Ferguson, and the other by Ferguson to Budlong, canceled and discharged of record. The facts of the case were substantially as follows:

Plaintiff being greatly embarrassed and her farm about to be sold in foreclosure, defendant agreed to bid it in for the benefit of plaintiff, to purchase various outstanding claims against her and to hold the farm "to secure him for such moneys as he should pay out in carrying into effect this agreement, and give her one year in which to redeem by repaying him the moneys he should pay out in carrying into effect the agreement, and that Mrs. Morris should also pay him all expenses, and for his time and trouble in connection therewith." Budlong thereafter purchased the claim above referred to, took a deed of the Morris farm from the sheriff, and on the 23d day of March, 1860, purchased the premises in question on the foreclosure sale, paying therefor in money and by his bond and mortgage \$11,290.87. To raise the money for these purposes, Budlong was obliged to go to Wisconsin to get in some investments which he had there, thus incurring expenses, and an absence from home of three or four weeks. That he should do so was agreed upon at the time the above arrangement was made. Immediately after the mortgage sale Budlong entered into possession of the farm, cultivated it, and received the profits thereof, except such portion as was received by the Morris family, until about March 31, 1866. During the first three years that family occupied the whole of the farm house, and during the remainder it was occupied by them and the family of Budlong. The time for payment by Mrs. Morris under the above agreement expired and was extended one year. The money was not paid, but no further extension was given. It was claimed in behalf of plaintiff, that defendant held the farm as mortgagee in possession and was chargeable not only with the rents and profits actually received by

him, but with the full rental value of the farm, which, it was alleged, had not been worked to its fullest capacity.

DANFORTH, J. An account rendered upon an application to redeem would properly charge the estate with the money advanced by Budlong and interest, with the expenses and compensation provided for by the agreement, and would credit the estate with whatever had been received from it by sales or rents and profits, as incident to the right of redemption, and as an equitable offset against the amount due on mortgage, after deducting taxes, repairs and other necessary expenses incurred on account of the estate. (*Ruckman v. Astor*, 9 Paige, 517.) It would include, therefore, the proceeds of timber sold and rents and profits actually received. That the farm was not worked to its fullest capacity furnishes no ground, under the circumstances of this case, for an enlarged liability. A provident owner might not do that, and there is no fact stated from which the wilful default of Budlong in this respect could be found. Nor has it been. He is in no sense a wrongdoer. He went into possession under the legal title, taken with the knowledge of Mrs. Morris and continued under circumstances which might well have induced a belief that he was in fact the owner of the estate, subject only to an agreement to sell. He was not technically at any time a mortgagee in possession. There was no mortgage. The character is cast upon him by the application of equitable rules to an oral agreement easily susceptible of two constructions, of which the one chosen is in direct contradiction of the written instruments which display his title, and he is therefore chargeable only with what he has received and not with what he might have received. "I think," says Lord Cranworth, in *Parkinson v. Hanbury*, 2 L. R. Eng. and Irish App. 1, "that it is perfectly clear law that where a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default." In 1 Story Eq. Jur., s. 514 a. (10th ed.) it is said: "Where the estate is thrown upon one in the necessary enforcement of his legal rights, or comes to his possession as trustee, he should only be required to act in good faith and to account for what he in fact realizes;" and so in *Moore v. Cable*, 1 J. Chy. 384, Chancellor Kent directed the defendant to be charged only with rents and profits received. In Harper's Appeal, 14 P. F. Smith, 315, it is declared that "whatever the rule on accounting might be, where the party charged was a mortgagee under an ordinary formal mort-

is just that of a judge in pro. after the time when duty to be at all arises.

In our case no doubt Mrs. Morris has to pay int. in case she redeems, so it seems that - on redemption Buddlong would have to be for all rent & profits from time he took pro. He wd have to be as owner in pro but who has made a contract to sell. But such a person by authorities has to be on same terms as judge in pro. ∴ our case seems error. Rule adopted was O.K. but was inapplicable to these facts.

Summary ^{probably}

- (1) Seem adept elected to work farm him- self & so shd be liable for occupation rent ^{to be held for} to be held for.
- (2) Seem ^{because he put himself up} if not ^{to be held for} elected in pro he ^{trans-fer} dor in pro, who must be for rent & profits from time under pays int & must be same as judge in pro. So his mistake as to his position would not help him.
- (3) Can only support case on view that every time a judge in pro does not know he is such he is to be held liable merely for what he receives. That seems wrong. Shd be held up to obliqs of position he thought he was in at least.

① Regular partial payment rule. is to make a reset whenever the receipts from part payments exceed the int ^{at the time of payment} ~~then~~ ^{but} not until then. And the part payments themselves do not draw int.

But this rule seems to have been adopted w.s. regard to Compounded int or rather on supposition that Compounded int cd not be reversed. Really,

today Compounded int may be contracted for, but some Courts hold Circumst except that if int be Com. due & there is an agreement to pay int on it that is O.K.

~~Where compounded int. Contracted for~~ And generally today you can only contract for int on int if debtor does not pay int when due. Can't contract that int is to be compounded & debtor to have no right to pay int. & so prevent Compounding.

If compounded int contracted for then of course it wd be added to int as it fell due & part payments wd not be off set until they exceeded this Com. pounded interest.

(2) But intge rule is different. Resets at end of year instead of when payments exceed int. - Under non-Compounded int - Unless payment exceed int at end of year wd really be no reset at all - all wd run on. Under Com. pounded int rule seems wd make a

gage, it ought not to be the same, when, by the express agreement of the party seeking equitable relief, he took and held possession as absolute owner." In the case before us there was not only a title taken by the defendant, by the plaintiff's wish, but there is alleged against it only an oral promise to convey at a certain time, upon payment of certain moneys, and no agreement to account in the meantime. There is nothing to show any want of good faith on the part of the defendant in his management of the property, nor that he did not act prudently and according to his best judgment in the matter. The omission of Mrs. Morris to redeem at the end of the time limited, the year, or at the end of the second year, her omission to arrange for further time to do so, the continued occupation of the premises by Mr. Budlong, apparently as owner, with no demand for an account of rents and profits—all bear upon this question, and, with the considerations before adverted to, show that the referee erred in measuring the profits for which Mr. Budlong was liable by the rental value of a farm worked to its full capacity rather than by what he actually received.¹

VAN VRONKER v. EASTMAN, 7 Met. (Mass.) 157, 163 (1843). SHAW, C. J. The account must be reformed by making annual rests. 1. State the gross rents received by the defendant to the end of the first year. 2. State the sums paid by him for repairs, taxes, and a commission for collecting the rents,² and deduct the same from the gross rents, and the balance will show the net rents to the end of the year. 3. Compute the interest on the note for one year and add it to the principal, and the aggregate will show the amount due thereon at the end of the year. 4. If the net annual rent exceeds the year's interest on the note, deduct that rent from the amount due, and the balance will show the amount remaining due at the end of the year. 5. At the end of the second year go through the same process, taking the amount due at the begin-

¹ Barnard v. Jennison, 27 Mich. 230 (1873); Hall v. Westcott, 17 R. I. 504 (1891); accord.

² Such commissions are allowed in Massachusetts: Gibson v. Crehore, 5 Pick. 148, 161 (1827); Gerrish v. Black, 104 Mass. 400 (1870); and in Connecticut: Waterman v. Curtis, 26 Conn. 241 (1857). But this is exceptional, commissions being generally refused even where stipulated for: Bonithon v. Hockmore, 1 Vern. 318 (1685); French v. Baron, 2 Atk. 120 (1740); Godfrey v. Watson, 3 Atk. 517 (1747); Clark v. Smith, Saxt. (N. J.) 121, 137 (1830); Harper v. Ely, 70 Ill. 581 (1878); Blunt v. Syms, 40 Hun. (N. Y.) 566 (1886). But see Green v. Lamb, 24 Hun. 87 (1881).

To deduct rental
to fair sum: diff-
erence agt. resid-
ing rental; not
personally in pos.
So not in pt. at all.
That he had
an abs. title under
a tax sale.

rest & add any surplus of int. to princi-
ple. Know no case. Permitting int. on
int. Comparatively recent.
Has been held that Eq. has discretion to
order net payment than once a year. Hard
to see why regular part pay rule shd not
be applied.

ning of the year as the new capital to compute the year's interest upon. So to the time of judgment.¹

*That interest
is in arrears
when mortgagee
takes pos.
does not
change rule
as to an-
nual rests.*

MOSHIER v. NORTON, 100 Ill. 63, 73 (1881). MR. JUSTICE SHELDON. Complainant takes exception to the mode of stating the account in making annual rests. The Master reported that on January 1, 1870, the principal sum due from Norton to complainant was \$8782.50; that the accrued interest thereon to that time was \$8240.93; that the net rents up to that time were \$8617.47. As the amount of rents at that time exceeded all interest due, said amount of the rents to that time was deducted from the whole amount of principal and interest at that time, leaving a balance due complainant of his principal sum, \$8405.96, on January 1, 1870. Then to this sum was added the interest for one year, the taxes paid in 1870, and interest thereon to January 1, 1871, which made the sum of \$9490.48, from which was deducted the rent of 1870 as found, \$1711.50, leaving a balance due complainant of \$7778.98 at that date. Then follow similar annual statements of balances on the first day of January in each year, up to and including January 1, 1880, the rents as found for each year exceeding the interest and taxes for the year.

Complainant concedes the mode adopted by the Master in making annual rests was the proper one when no arrears of interest are due at the time the mortgagee enters into possession, but [claims] that, where the interest of the mortgagee is in arrears, as in the present case, when the mortgagee takes possession, the court will not require annual rests to be made, even although the rents and profits

inf. "The two essential points are: First, that when there is a surplus of receipts in any year above the interest then due, a rest shall be made, and the balance remaining after discharging the interest shall be applied to reduce the principal, so that the mortgage shall not continue to draw interest for the face of it, when in fact the mortgagee has in his hands money that should be applied to reduce the principal, and thereby make the interest less for the following year. Secondly, although the amount received in any year be insufficient to pay the interest accrued, the surplus of interest must not be added to the principal to swell the amount on which interest shall be paid for the following year; for that would result in the charging of interest upon interest, which is not allowed; but the interest continues on the former principal until the receipts exceed the interest due."—Jones, Mortgages, § 1139.

The cases are numerous and generally accord. *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13 (1814); *Reed v. Reed*, 10 Pick. (Mass.) 398 (1830); *Green v. Wescott*, 13 Wis. 606 (1861); *Gladding v. Warner*, 36 Vt. 54 (1863); *Mahone v. Williams*, 39 Ala. 202 (1863); *Adams v. Sayre*, 76 Ala. 509 (1884); *Bennett v. Cook*, 2 Hun (N. Y.) 526 (1874).

Morshier v Norton, 562.

Seems no good qrd for Eq. rule to contra.
If neither order partial-payment rule
nor annual rent rule applied, letgee
gets great advantage; he gets part pay-
ments pays no int on them until
all pd. while meanwhile the ^{whole} price
is drawing interest. To apply such
a rule is clearly wrong.

(1) Question that arises in case is as to how far outgoer can claim for payments voluntarily made - not the? as to how far he is bound to make payments.

As to latter is almost no authority. (a) Surely not bd to make payments unless in pos. (b) Suppose in pos & lets land be lost by sale for taxes or other encumbrance. Single Ill. case indicates that must pay taxes. Seems questionable. Case is distinguishable from repairs. There outgoer can't enter to make repairs. But outgoer can pay taxes & other encumbrances as well as outgoer. To compel outgoer to lay out large sums of money in this way wd seem wrong. Probably true view is not bound at all, according to statement in case.

(2) What he does lay out in removing liens from land he may ~~by better view add to outgoer's debt & undoubtedly recover.~~ If outgoer wishes to redeem he must pay such sums in order to redeem.

may exceed the annual interest, nor until the principal of the mortgage debt is entirely paid off. There is authority for this position and distinction. It appears to be supported by Judge Story in his Eq. Jur., vol. 2, sec. 1016, a, and the English cases cited by him. But there are American decisions which lay down a different rule, as we regard, and agreeing with the one which was adopted in this case. *Van Vronker v. Eastman*, 7 Metc. 157; *Green v. Wescott*, 13 Wis. 606; 2 Jones on Mort., secs. 1139, 1140. . . .

look up.

No satisfactory reason appears to our minds why, when there is a surplus of receipts in any year above all the interest then due and disbursements, the balance remaining after discharging the interest should not be applied to reduce the principal; and this, irrespective of the fact whether there was or was not interest in arrear at the time the mortgagee took possession. We view the mode adopted by the Master in making annual rests just and reasonable, and find no error therein.¹

(c) Superior Liens.

GODFREY v. WATSON, 3 Atk. 517 (1747). LORD CHANCELLOR [HARDWICKE] said that a mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it shall carry interest.

HARPER v. ELY, 70 Ill. 581, 584 (1873). MR. JUSTICE CRAIG.

It is claimed by appellants that the court erred in allowing

"Now, thinking, as I do, that, both upon principle and authority, the mere fact of an arrear of interest being or not being due to the mortgagee when the mortgagee takes possession, is not decisive upon the question of rests, but that every circumstance must be regarded, looking at all the accompanying circumstances, looking at the general right of a mortgagee not to be paid piecemeal, looking at the position to which Mrs. Priestly [the mortgagee in possession] has been driven by the wrongful acts of the parties opposed to her, I think that she ought not to be compelled to have her account taken with rests."—Per Knight Bruce, V. C., in *Horlock v. Smith*, 1 Coll. Ch. 287, 297 (1844).

Compare *Finch v. Brown*, 3 Beav. 70 (1840); *Wilson v. Cluer*, id. 136 (1840); *Patch v. Wild*, 30 Beav. 99 (1861), and *Bennett v. Cook*, 2 Hun. (N. Y.) 526 (1874).

- 3 Beav. 70. Says ordin rule is not to have rest if int is arrear when intger takes pos.
- 3 Beav 136. Same.
- 30 Beav. 99. Recognizes rule & says may apply to other cases where intgor in default. In case intgor not in default.
- 2 Hun 526. Payments, rests, & profits never exceeded int. during whole time. Held annual rest.

the Thompson and McQuestion debt. This debt was secured by a prior trust deed on the premises, and Ely, in order to protect his interest under the mortgage, under which he claimed, was compelled to discharge this lien.

? fact.
We apprehend there can be no doubt but a mortgagee is entitled to be repaid all sums he may advance for the purpose of removing a prior incumbrance from the mortgaged property. The fact that Ely paid off or purchased this debt, which was a prior lien on the land, could work no hardship on the complainant. It was a subsisting debt, and a lien upon the mortgaged premises, and had to be paid, and whether complainants are required to pay it to Ely, or the original holder, can not, in anywise, prejudice their rights. But this debt was also secured by the Haddock mortgage, as well as a prior deed of trust, and may be regarded as a part and parcel of the mortgage debt from which complainants are seeking to redeem. In either event, however, we regard the decision of the Circuit Court on this point correct; but it is said ten per cent. interest ought not to be allowed Ely on this claim, after it came into his hands. The claim drew ten per cent. interest in the hands of the original holder, and when Ely bought or paid it, in equity he was subrogated to the rights of the original holder of the claim; and when the original creditor, by the terms of the contract, was entitled to ten per cent. interest, we fail to see upon what principle Ely would not be entitled to the same.¹

Ely mortgaged property. He died devising prop for life to wife (widow) with remainder to heirs (children & brother). Mortgage was assigned to prior holder & Ely to protect mortgage paid there on prop. Held they can add these to SIDENBERG v. ELY.

action to purchase
COURT OF APPEALS OF NEW YORK, 1882. *duty of life tenant - (90 N. Y. 257.) went to pay these makes*

Appeal from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made May 11, 1880, which affirmed a judgment in favor of plaintiff, entered on a decision of the court on trial at Special Term. *no def. debts ed have pd themselves or com- pelled life tenant to pay. They still can hold life tenant.*

The nature of the action and the material facts are stated in the opinion.

None of these have any bearing on? of int.
¹Silver Lake Baptist v. North, 4 Johns. Ch. 370 (1820); Page v. Foster, 7 N. H. 392 (1835); Arnold v. Foot, 7 B. Mon. (Ky.) 66 (1846); McCormick v. Knox, 105 U. S. 122 (1881), and the authorities generally accord.

(1) That outgor must pay sum expended by outgor in removing encumbrance in order to redeem we have seen.

(2) But can outgor continue obligation he pays off in force for purpose of obtaining advantages, as here higher interest, by so doing?

It is clear that outgor is Subrogated to outgor or other lien he removes for purpose of reimbursing himself. But to just what extent can he reimburse himself? Is it really reimbursement?

Is outgor Subrogated

(a) So that he stands just in shoes of party he pays off? or

(b) So that he can be reimbursed? or

(c) So that he can recover the unjust enrichment conferred on outgor?

If you take view (a) then he shd have rate of int that lien he paid off was drawing.

If you take view (b) then he shd have only ordin legal int. on amt he pays. Cf. Suretyship Cases where that is the rule. Ames, Cases, Suretyship, 398-9.

If you take view (c) then seems shd recover only amt paid + legal int. The unjust enrichment occurs when the lien is paid off. Outgor Eg. redeem. is thereby made worth more. Seems shd be measured at that time and that amt + int ^{legd} considered sum due.

Which view is true one? Shd outgor be indemnified or merely allowed of cont right for unjust enrichment? ~~Seems latter. He is under no oblig to~~

the unjust enrichment theory same result might be reached. P'tf can't recover more than benefit to def't. But can he recover that much where he is not out that much. Seems shd not. Def't must be enriched & p'tf made poor to have recovery on that theory. Neb. Ct held that only SIDENBERG v. ELY. recover what he actually paid. Seems right. Analogous rule in case of an prom.

Prob making little diff. w/ view (in dem. nity - ed not recover that if paid off prior claim in reason-ably.

SEC. V.] SIDENBERG v. ELY. 565

MILLER, J. This action was brought for the foreclosure of a mortgage made by one William G. Ely, deceased, in 1825, to the Aetna Insurance Company, to secure the sum of \$3000. It contained no clause in reference to taxes and assessments. In 1872, the Aetna Insurance Company assigned the mortgage, together with the bond accompanying the same, to the Excelsior Life Insurance Company. This company paid, while it held the mortgage as assignee, certain taxes, assessments and water rates upon the mortgaged premises, and to redeem the same from tax sales, which together amounted to the sum of \$1640, or thereabouts. In the year 1875, the Excelsior Life Insurance Company assigned the bond and mortgage, with the whole amount due by reason of the payment for taxes, etc., to the plaintiff, who purchased at the request of the mortgagor, and under an agreement to extend the payment of the principal until September, 1878, previous to which time this action was commenced. Subsequent to his purchase, the plaintiff paid certain taxes and assessments, amounting to the sum of \$925. At the time of the assignment to the plaintiff, the sum of \$934.78 was due for interest. The defendant Catharine Ely is the widow and executrix of the mortgagor, who died leaving a will, by which he devised her the estate for life with remainder over in fee to the children of his brother James, who are defendants in this action. Upon the trial, the court allowed for the taxes, assessments and water rates paid by adding them to the mortgage, which, with the principal and interest found due to the plaintiff, amounted to the sum of \$7365.70.

he actually paid on in b. file belief of ownership. So seems unjust result view, worth justice. Also it on p'ing since utges not bd. to pay but seem-ly may pay. Hardly a case for giving him in dem. nity. Dif. from security.

Added to utge.

The most material question upon this appeal arises in regard to the rights of the plaintiff to the amount of taxes and assessments paid by him and his assignor, and to collect the same out of the mortgaged property. The rule seems to be established by abundant authority that when the owner of mortgaged property refuses or neglects to pay taxes and assessments, or liens of a like nature, which are imposed upon the mortgaged premises, the mortgagee has the right to pay the same in order to protect his security, and the amount so paid may be added to and become a part of the mortgage debt, which may be enforced upon a foreclosure of the mortgage.

Willard, in his work on Equity Jurisprudence, at page 446, lays down the rule that taxes paid may be added to the mortgage debt, and he adds, "so money paid by the mortgagee to redeem the premises from a tax sale becomes part of the mortgage debt in equity;" he further says at page 448, "with regard to the amount to be paid on redeeming, it may be said, that as taxes are a legal charge upon the estate, they may, if necessarily paid by the mortgagee, be added

~~the unjust enrichment theory that requires not only benefit to utgor but at expense of utgee to permit recovery that result shd not be reached. In Neb Ct held that ed only recover amt pd + int, not amt of loan recovered.~~

to the mortgage debt." The same rule is upheld in *Thomas on Mortgages*, at pages 86 and 276, and in *Jones on Mortgages*, at sections 77 and 1134. In the last authority it is laid down that this is so, although there be "no tax clause in the mortgage."

Numerous cases in the reports sustain this doctrine. (*Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Burr v. Veeder*, 3 Wend. 412; *Brevoort v. Randolph*, 7 How. Pr. 398; *Faure v. Winans*, Hopk. Ch. 283; *Marshall v. Davies*, 78 N. Y. 414; *Robinson v. Ryan*, 25 id. 320; *Williams v. Townsend*, 31 id. 414.) These cases are criticised by the counsel for the appellant, and it is claimed they do not sustain the doctrine contended for. While all of them do not entirely cover, yet they tend to the support of the principle that a mortgagee, who to save his mortgage and protect his security is under the necessity of paying the taxes and assessments to prevent the property from being sold, should be allowed for the same as a part of his mortgage debt upon the foreclosure of his mortgage. Whether the doctrine of tacking, as claimed by the counsel for the appellants, has any application, is not important to consider, if the principle we have stated can be invoked to save the mortgagee from the sacrifice of the property by reason of unpaid taxes or assessments. In accordance with the authorities already cited, it is not necessary that the premises should be sold prior to the payment of the taxes or assessments before the mortgagee is authorized to pay the same, and add the amount paid by him to his mortgage. (See *Eagle Fire Ins. Co. v. Pell*, and *Williams v. Townsend*, *supra*.)

The doctrine that neither the plaintiff nor his assignor could have any benefit from the doctrine of subrogation, because they voluntarily paid the taxes and were conspirators, cannot be upheld. There is no finding in the case that either of them purchased the mortgage with the intent of paying the taxes and assessments so as to relieve the life estate and cast the burden upon the remaindermen; they were paid evidently in self-defense, and for the purpose of saving their liens as mortgagees. It cannot, therefore, be said that they were volunteers, or that they acted in bad faith as to others, or to any one who was under a legal necessity to make the payment, even if it may be urged that if the taxes had remained a lien, the life-tenant would have been obliged to pay them to prevent a sale of the property by the State or a return thereof, as that furnishes no reason why the plaintiff had not a perfect and complete right to protect his security from sale for the taxes. There is no rule by which the holders of the mortgage were obliged to delay the payment so as to compel the remaindermen to take action in regard to the same and relieve the property. They should have been vigilant in looking after their rights, and if they had done

- (1) That mortgagee may foreclose mortgage for full amount including sums paid to remove prior incumbrances is also settled. Are lots of cases as to paying taxes & several as to prior mortgage.
- (2) Mortgagee who pays prior incumbrance then can
- a. sue for money paid. ?
 - b. foreclose his own mortgage & include payment in debt.
 - c. foreclose the lien or incumbrance he paid off. Will want to do this especially where his own mortgage not yet due or later paid.
- (3) That mere life tenant or remainderman has made no diff. as both claimed under mortgage & mortgagee is superior to them.
- (4) In cases in note 568 / ? is raised as to rights of mortgagee who buys at a sale for taxes or under other lien, as distinguished from one who pays off the lien. In next section will see if there is a conflict as to whether later mortgagee buying must hold for mortgagee paid if compelled in fact to do so. If need not hold for mortgagee he gets all he bought, mortgagee gets nothing, is not unjustly enriched & so mortgagee entitled to nothing. In case represents his view: My. the 2nd.
- See Williams v. Townsend 585.

their duty the taxes would not have accumulated. Having failed to perform a plain duty, if they desired to protect the property against the taxes, after they have permitted the mortgagee to pay the taxes, they are in no position to object that it operates as a hardship upon them. They would have had an undoubted right to make application for the appointment of a receiver to collect the rents and apply them to the payment of the taxes. (*Cairns v. Chabert*, 3 Edw. Ch. 313; 1 Washburn on Real Prop. 97.)

remain dermen

In the case we are considering, the taxes remained unpaid from the year 1865 to the year 1872, and then again from 1872 to 1874, all inclusive. For eight years they were allowed to accumulate in the first instance, and afterward for three years, and during that period no effort was made to pay them, nor any attempt to compel the owner of the life estate to pay them, or the appropriation of the rents for that purpose. Here was a gross neglect which would have resulted in the sale of the property, and perhaps the destruction of the estate; but for the intervention of the owner of the mortgage.

Again, if the mortgagee or his assignee had the right to pay within the authorities to which we have referred, to protect his mortgage lien, any equity which might have existed between the life-tenant and the remaindermen cannot destroy or take away that right. The remainderman's rights and his interests are subject to the right of the mortgagee, which was a prior and superior right given by the mortgagor. If the mortgagor had survived, and the mortgagee had paid the taxes, the amount paid would clearly have been a claim against the mortgagor and the mortgaged premises. The devisees of the mortgagor cannot have any greater or better right than the mortgagor, and they stand in his place. There was no evidence of any fraud or any conspiracy, to impose upon the remaindermen an obligation which belonged to the life-tenant to perform. The mortgage was purchased by the plaintiff in good faith, as found by the trial court, which also refused to find to the contrary. The effect of the payment was, although it increased the amount of the mortgage, to cancel and discharge the lien of the taxes for the same amount. The estate of the appellants was bound to pay the taxes, and the payment by the mortgagee, or his assignee, did not add or increase the burden imposed thereby, but in fact it operated to reduce the rate of interest on the amount of such taxes. Equity could not grant relief to the remaindermen, for the reason alone that the lien had been changed from a tax lien to that of a mortgage lien, and we are unable to see why the life-tenant could not as well have been charged with the burden of the taxes after payment by the mortgagee, as he could before such

O.K.

payment, and in this case no reason existed why the interest of the life-tenant in the fund after payment of the mortgage by a sale should not have been burdened with this charge.

The defendants claim they are entitled to pay up the mortgage and to be subrogated as mortgagees, leaving the plaintiff to his remedy, or if the property be ordered to be sold, that the value be computed, and only that value, less the present value of taxes and interest during the life in expectancy, be applied to the accretions, and that after applying the present value of such taxes and interest only, the remainder of the principal sum be paid out of the sale of the inheritance.

It does not appear that the defendants have applied to be subrogated as mortgagees, or placed themselves in a position which entitled them to an assignment of the mortgage; nor was the question raised upon the trial as to the application of the interest and taxes. The plaintiff is entitled to the payment of the mortgage out of the real estate upon a sale thereof, and the question as to the disposition of the surplus, if any there be, does not arise upon this appeal.¹

The other points urged by the appellants' counsel have been carefully examined and considered, but none of them present any sufficient ground for a reversal of the judgment. There being no error, it should be affirmed.

All concur, except RAPALLO and TRACY, JJ., absent.

*Judgment affirmed.*²

¹A portion of the opinion, not relating to the question under examination, is omitted.

²There is no dissent from the doctrine of the principal case, the apparent aberration of the Supreme Court of Iowa in *Savage v. Scott*, 45 Iowa, 130 (1876), having been promptly corrected: *Barthell v. Syverson*, 54 Iowa, 160, 164 (1880). The same result is reached in Kansas by statute. Gen. Stat. 1889, Ch. 107, § 148; *Stancliff v. Norton*, 11 Kans. 218 (1873). That a mortgagee who has redeemed from tax sale is to be allowed only the amount of the taxes and not the amount paid by him for redemption, see *Moshier v. Norton*, 100 Ill. 63, 74 (1881). As to the position of mortgagee purchasing at tax sale, see *Dale v. McEvers*, 2 Cowen (N. Y.) 118 (1823); *Strong v. Burdick*, 52 Iowa, 630 (1879).

45 Ia. 130 held it not to be foreclosure for amt of loan re-
mained. Tax pd.
54 Ia. 160. ^{held said} above case must be confined to par-
ticular facts. ^{held} since was agreement
in mtg that mtgor. wd pay taxes & ins.
that mtgee on paying cd tack to mtge.

Have already seen various respects in which Courts treat mortgage, as holding a quasi-fiduciary relation to mortgagee. He cannot get mortgagee to ~~pay~~ ~~ref~~ bar Eq. redemption. If mortgagee buys equity he must do it in perfect fairness. If mortgagee goes into possession he must act prudently in getting profits & ~~are~~ for them; he must not recklessly fail to repair. Where he gets an absolute deed it will be made a mortgage if intended as security.

Now we have some further miscellaneous illustrations of same feeling. Mortgage is not a trustee but for some purposes he is in a fiduciary relationship. It is Sci. Genius.

As to this case, what authority there is compels mortgagee to hold new lease subject to mortgage under some circumstances, at least. In the Ball & Bratty case Ct. decided would only apply rule where mortgagee in pos or where obtains renewal behind mortgagee's back & so unfairly. Whether were fact that mortgagee is in pos. shd be enough in all cases no matter how fairly he acted is questionable. Probably true rule wd be that if any underhandedness in obtaining renewal then mortgagee can redeem it.

(d) Mortgagee, how far a Trustee.

MANLOVE v. BALE.

HIGH COURT OF CHANCERY, 1688.

(2 Vern. 84.)

One Bruton having a church-lease for three lives in 1664, conveyed and assigned it to the defendant Bale's father, in consideration of 550*l*. The conveyance was absolute. But Mr. Bale, the purchaser, by writing under his hand and seal, agreed that if Mr. Bruton, the vendor, should at the end of one year then next ensuing pay him six hundred pounds, that he would reconvey; the six hundred pounds was not paid, and two of the lives died, and the lease was twice renewed by the defendant Bale and his father; and now it was near twenty years after the first conveyance. Bruton being a prisoner in the Fleet, and indebted to the Warden for chamber-rent, assigns to him all his right, title, interest, equity and power of redemption; and thereupon the plaintiff Manlove, the Warden of the Fleet, brought his bill to redeem and to have an account of the rents and profits of the premises.

The defendant insisted on his title, and that the estate was not now redeemable, nor ought he to account for the profits.

But, notwithstanding, the MASTER OF THE ROLLS decreed a redemption on payment of the 550*l*. which was the first consideration money, as also the fines paid upon the renewal of the leases, which monies were to be paid with interest, and the account of profits was to commence but from the death of Peter Bale, who was the purchaser, and father of the defendant, and until that time the profits were to be set against the interest of the 550*l*. consideration money.¹

¹ "The mortgagee here doth but graft upon his stock and it shall be for the mortgagor's benefit."—*Per* Nottingham, L. Ch., in *Rushworth's Case*, 2 Freem. 12 (1676).

"This additional term comes from the same old root, and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagee's getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor."—*Per Curiam* in *Rakestraw v. Brewer*, 2 P. Wms. 311 (1728). But see *Nesbitt v. Tredennick*, 1 Ball & B., 29, 46 (1808), and compare *Keech v. Sandford*, Sel. Cas. Ch. 61 (1726).

AMHURST v. DAWLING.

HIGH COURT OF CHANCERY, 1700.

(2 Vern. 401.)

The defendant having mortgaged the manor of Thundersley, to which an advowson was appendant, to the plaintiff, who brought the bill to foreclose, the church became void; the defendant moved the court for an injunction to stay the proceedings in a *quare impedit* brought by the plaintiff.

Per Cur. Although the defendant Dawling hath no bill, yet being ready and offering to pay the principal, interest and costs, if the plaintiff will not accept his money, interest shall cease, and an injunction to stay proceedings in the *quare impedit*; for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt, and the mortgagee therefore in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor.

And the like order was made between Jory and Cox,¹ where the defendant had an injunction against the plaintiff to stay his presenting to a church, that became vacant pending the suit.

CHOLMONDELEY v. CLINTON, 2 Jac. & W. 1, 177 (Court of Chancery, 1820). In a bill for redemption of certain mortgaged estates the plaintiffs showed that the defendant, Lord Clinton, unlawfully claiming the equity of redemption, was in possession of the estates, and prayed that he be decreed to deliver them up. Lord Clinton answered and showed that he had been in quiet and undisturbed possession and enjoyment of the premises for upwards of twenty years, paying the interest on the mortgage during the whole of that time.

It was argued on behalf of the plaintiffs that Clinton's possession, being avowedly that of a mortgagor, must be referred to the estate of the mortgagee, and that the latter, as trustee of the rightful mortgagor, the plaintiff, Mrs. Damer, could not set up or recognize a claim hostile to her interest.

SIR THOMAS PLUMER, M.R. These appear to have been the principal reasons assigned for this doctrine. I cannot bring myself to adopt them. The view which is taken by them of the relation subsisting between mortgagor and mortgagee, and the character, rights, and duties separately belonging to each, is not the view which is

¹Finch, Pre. Ch. 71. See also *Croft. v. Powell*, Com. Rep. 609.

When mortgagee can make nothing to reduce mortgage by ex. exercising ownership he will be treated as a bare trustee.

Mortgagee not in general a trustee. Rule that pos. of trustee cannot be a defense to cestui. has no application.

Re presentation to church.

as if he were mortgagee.

Note off p. 571

A is mortgagee & B trustee. C pays interest & remains in possession for 20 yrs. ? is he C got title as A. A claims B is a trustee & that C has always recognised B's title, that B is a trustee for A. Held B is not trustee & arg. really

is so far. The full report held also that pos. coupled with a claim in equity right gives one that right by analogy to St

Case represents the English rule. The presentation was nothing out of which mortgagee could make his claim. If he were allowed to exercise the right it would add to his security. As to it \therefore he was held to be a bare trustee for mortgagee. Croft, Mortgage, 1st Ed. 59. That an advowson was not, for nearly all purposes, ^{considered} a thing to make money out of see Advowson in Equity. of Laws of England.

If a case should arise in modern law of a right belonging to land mortgaged, wh. right could not be made to meet the mortgagee any thing, no doubt same principle would be applied & would be held that mortgagee holds it on bare trust for mortgagee. Could think of no such right.

Here also mortgagee was offering to pay up in full - of course then mortgagee should be restrained & compelled to permit redemption.

(1) Good ^{short} summary of main pt in case in Lewis, Trusts, 10th Ed. 886 et seq. Holds that where legal title is in one party & Equit right in another, if a 3rd party takes pos claiming the Equit. st. & so held pos for 20 yrs he thereby gets the Equit. right. So one may not only get a legal title by adverse pos., but also cut off an Equit title - by adverse pos., but he can obtain another's Equit title - by adverse pos. when legal title all the time remains in trustee or life ~~the~~ ^{any when} adverse possessor admits legal title is in trustee. Clear in principle. Seems no authority, at least Perry cites none.

(2) Then dis. we have in book arose as to whether part that utgers held legal title & ^{two} claimants instead of King. Certain where utgers made a dif. P^l was true utgers - depts were persons who had been in pos 20 yrs claiming to be utgers. Held made no dif that arg. failed doubly: (a) If utgers a trustee yet certain's right cd be lost by adverse pos by one claiming to be certain [as set forth above] (b) Any how utgers not a trustee.

Discussion of Ct is good ^{dis.} ~~summary~~ of how far a utger is a trustee & how far not. Not complete. Clearly is not strictly a trustee.

taken and acted upon in a court of equity. The relation subsisting between mortgagor and mortgagee is one of a peculiar and anomalous nature, and is regulated not by the form of the conveyance, or the legal consequences and effect of it, but by a system of rules established by a long train of decisions, and universally adopted and acted upon in a court of equity. If the form of conveyance and the legal title were to prevail, the absolute ownership of the estate, after the condition is forfeited, would, in the case of a mortgage in fee, belong forever to the mortgagee, without any trust or defeasance of any kind. The mortgagor would then be reduced to the condition in which the argument represents him to be. But is that the light in which he is ever considered in equity? Is he there for any purpose ever considered as a tenant at will, holding the possession under the mortgagee? Is any point better established than that a mortgagor, after executing a mortgage in fee, and after the condition forfeited, is still considered to remain the absolute owner of the estate, as he was before, for every purpose as against all the rest of the world, and as against the mortgagee for every other purpose, except only the security and pledge which the estate is become for the repayment of the debt contracted by the mortgage? It would be a useless waste of time to cite authorities upon a subject so familiar.

It is said that the mortgagee is a trustee for the mortgagor; that their interests are parts of one title, and together form one entire estate; and that the admission of the title of the one is virtually and of necessity an admission of the title of the other; that the length of time cannot be set up as a bar by the mortgagee against his *cestui que trust*, Mrs. Damer; and that the existence and validity of the title of the mortgagee being on all sides admitted, the benefit of it must be given by the mortgagee (the trustee) to his *cestui que trust*, Mrs. Damer. The equity of redemption is admitted to exist, and must, therefore, be given to the rightful, and not the tortious, owner.

I will consider separately each of these positions, and first, as to that of the mortgagee being a trustee for the mortgagor, upon which so much of the argument is built. That the consequences contended for would not follow, even if the character of trustee did properly belong to the mortgagee, not being in actual possession, I have already endeavoured to show. It may be proper, however, to consider how far, and in what respect, he is to be considered as possessing that character. The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a court of equity. Lord Mansfield, adverting to the comparisons made in

Is this genuine

Argument under which point was important.

Main dis. in as to this.

respect to mortgages, has, I think, said there is nothing so unlike as a simile, and nothing more apt to mislead. A mortgagor has had ascribed to him a variety of different characters, in which there existed some points of resemblance, when it was not very material to ascertain what his powers or interests were, or to settle with any great precision in what respects the resemblance did, and in what it did not exist. But it would be productive of much error if it were to be concluded that the resemblance was complete, in every point, to any one of the ascribed characters. The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, trustee and *cestui que trust*, have been applied to the relation of mortgagor and mortgagee, according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee? *Quo teneam vultus mutantem Protea nodo?* The truth is, it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterise the relation; they are (as Mr. Justice Buller observes, in *Birch v. Wright*, 1 T. Rep. 383) characters as well known, and their rights, powers, and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purposes of it, and after that is fully satisfied; its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and *cestui que trust*. They have always an identity and unity of interest, and are never opposed in contest to each other. The late Master of the Rolls observes, that in general a trustee is not entitled to deprive his *cestui que trust* of the possession, but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked. By not interfering in this latter case, a court of equity does not, as it is supposed, in opposition to its usual principle, refuse to afford protection to a *cestui que trust*, against his trustee; but the interference is refused, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee

Not fiduciary

Not a use. dif.

?
Trustee can't
get pos. - mortgagee
can

diff. b/w
Mortgagee &
Trustee

and *cestui que trust*. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. Upon the same principle the mortgagee is not prevented, but assisted in equity, when he has recourse to a proceeding which is not only to obtain the possession, but the absolute title to the estate, by foreclosure. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest by the person claiming to be the mortgagor is a recognition of that relation subsisting between them, but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor.

The ground on which a mortgagee is in any case, and for any purpose, considered to have a character resembling that of a trustee is the partial and limited right, which, in equity, he is allowed to have in the whole estate legal and equitable. He does not at any time possess, like a trustee, a title to the legal estate distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either he is fully entitled to both, and to the legal and equitable remedies incident to both; but in equity, his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than and as may be necessary to secure the repayment of the money due to him.

When that is paid, his duty is to reconvey the estate to the person entitled to it; it never remains in his hands clothed with any fiduciary duty. He is never entrusted with the care of it, nor under any obligation to hold it for any one but himself, nor is he allowed to use it for any other purpose. The estate is not committed to his care, nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may undergo, either by the act of the mortgagor, without his privity, or by operation of law, by descent, forfeiture, or otherwise, and consequently, as I have already endeavoured to shew, by the operation of the analogy to the statute of limitations. When the interest of the mortgage money is tendered to him from year to year by the person who, claiming to have succeeded the original mortgagor in the

Real and of
Equity
vs. Dawling
570.

hardly a
diff. as same
of trust.

title to the equity of redemption, is, by the acquiescence of the rightful owner of it, allowed to remain in the quiet and uninterrupted enjoyment of the estate as the sole and admitted owner, can he be expected to refuse receiving it upon any doubts of his own respecting the title, when it is apparently abandoned by those who possess better means of judging of it, and who alone are interested in contesting it? If there is no fraud, or collusion of any kind, the fault lies wholly with those who possess the rightful title to the equity of redemption. The mortgagee is a mere indifferent stakeholder. The real contest lies between the competitors for the estate, which, in the hands of either, must continue subject to the mortgage till paid off; when paid off, the mortgage title ends, and then, and not before, the implied trust, to surrender the estate to the person entitled to demand it, begins. If there is a question who that person is, it must be contested, not by the mortgagee, but by the parties concerned, and between them the title must be decided in the same manner, and by the same principles, though the form in which it may be contested may differ, as it would have been had no mortgage existed. *Mull v. Carl* 2 *Wyllie v. Wyllie* 3 *Wyllie v. Wyllie* 4

Mtgor 1st Cash
| 2nd Inst.
| 3rd Ins. Co.

Admir
Hoff.

Mtge to Carb. 2d Mtge to Natl Prv. Institution.
with power of sale. 3rd mtge to Ins. Co in
form of trust deed to sell & pay prior
cutges, itself, & bal to mtgor. Default. Ins.
KIRKWOOD v. THOMPSON. Co. took prv. & received
HIGH COURT OF CHANCERY, 1865. 2nd mtgee
(2 De G., J. & S. 613.) under power of sale sold

This was an appeal from a decree of Vice-Chancellor Wood. *part of it.*
The bill was filed by the heir-at-law and administratrix of Stephen *Adair of*
Kirkwood, late of Kingston-upon-Hull, to redeem certain hereditaments which had been mortgaged and sold under the following circumstances: By an indenture dated the 17th January, 1846, certain hereditaments, the property of Stephen Kirkwood, were conveyed by him to William Cash and others in fee by way of mortgage for securing the sum of 5500*£*. and interest. The mortgage contained a power of sale in case of default in payment of principal or interest on six months' notice. By another indenture dated the 16th June, 1846, other premises were mortgaged by Stephen Kirkwood in fee to George Davidson and others, as the trustees of the National Provident Institution, to secure 4000*£*. and interest. By an indenture of even date the said sum of 4000*£*. was further secured by a second mortgage of the premises comprised in Cash's mortgage. The two last-mentioned deeds contained power of sale, *and for sale to redeem. Held for deft. Sale was good. Mortgage is not trustee so as to prevent him buying from*

utgor. This was in effect solely by virtue
since 2nd utgor sold under power
of sub from utgor. & so good under
special circumstances. None here.
2nd Utgor (penelaves) in pos, that his
deed was in form a trust deed tho'
K.O. a intor. an in material. No

We have seen (ante Cheyeh v. Mack, p. 304) that outgor
Can buy at a ^{sale under a power} ~~power~~ of P. & P. 193-4.

Anybody but officer selling their agents can
buy at an ordinary foreclosure sale, and.
Then comes question how far can
outgee buy at a sale under a power?

It is right of authority that if he
as outgee having the power is making
the sale, he can't buy. My. Ten. & Tex.
are given a contra. But in My. rule
is changed by ^{And can buy if consent to it} ~~giving in outgor~~.

But on other hand outgee can buy
Eq. from outgor if latter no unfair ad-
vantage. We have seen that.

Suppose then our case which is betw
the two. Sale is under a power of sale
in a prior outgee. Seem arg. of
It is perfectly sound, that sale by
a prior outgee is really like sale by
outgor. That buying outgee is not
occupying inconsistent position of
seller & buyer also & so can buy.
Of course if strictly a trustee cd.
not buy & hold is certain. But not
a trustee. One or two cases in U.S.
that tend to contrary view. Matter greatly
open & Eng rule clearly right. But
see late cases in section where are same
on prin.

Rule that transaction must be fair when
outgee buys Eq. redemp. at a public sale is
usually sufficiently satisfied as Ct held
here (End of opinion). If showed collusion
with prior outgee selling no doubt wd be
bad on ^{that} ~~the~~ grounds.

subject to the proviso that the power should not be exercised without six months' notice, or unless three months' interest was in arrear; and they also contained a proviso exempting the purchaser from liability to see to the performance of this condition, and restricting his remedy to damages only.

Subsequently to these deeds Stephen Kirkwood, having borrowed 1000*l.* from the North of England Fire and Life Insurance Company, agreed to execute a good and effectual mortgage to the defendants Messrs. Thompson and Carr, as trustees for the insurance company, of the hereditaments comprised in the previous mortgages. This agreement was carried into effect by an indenture dated the 10th December, 1847, and made between Stephen Kirkwood of the one part and Messrs. Thompson and Carr of the other part, whereby Kirkwood conveyed to Messrs. Thompson and Carr in fee all the hereditaments comprised in the above-mentioned mortgage-deeds, but subject to the prior mortgages, upon trust that Messrs. Thompson and Carr should, in their discretion, at any time, without any further consent or concurrence of Stephen Kirkwood, his heirs, executors, administrators, or assigns, sell and absolutely dispose of the premises, and should out of the proceeds of such sale pay all costs and expenses, and the principal money and interest due to themselves, and all other incumbrances, and pay over the surplus to the mortgagor. Kirkwood died in July, 1848, leaving a will, but the executor renounced probate, and administration was granted to Mary Todd, one of the plaintiffs, on the 10th February, 1859.

In 1849, in consequence of default having been made in payment of the interest due to them, the North of England Insurance Company entered into possession of the premises and received the rents, which were, however, as they stated in the answer, insufficient to pay the interest on the company's mortgage, after paying the interest on the prior mortgages. In 1850 the trustees of the National Provident Institution, with the consent of the persons interested in Cash's mortgage, put up to auction the whole of the hereditaments comprised in their mortgage. Previously to the sale the solicitors of the National Provident Institution communicated to the North of England Company their intention to sell, and gave them a formal notice to pay the prior mortgage, but no notice was given to any person on behalf of the mortgagor, there being at that time no representative of Kirkwood's estate. Mr. Hall, one of the directors of the North of England Company, attended the sale, which took place on the 24th October, 1850, and became the purchaser of part of the property for 5590*l.* The North of England Company adopted this purchase and paid the

purchase-money, and Hall executed a declaration of trust in their favour. The North of England Company was subsequently dissolved, and their business was purchased by the Liverpool and London Fire and Life Assurance Company, and the premises were conveyed to their trustees in May, 1860.

The plaintiffs filed the present bill against Messrs. Thompson, Carr and Hall and the Liverpool and London Assurance Company, praying that the plaintiffs might be declared entitled to redeem the premises purchased by Hall, and that Hall and all persons claiming under him might be declared trustees for the plaintiffs, and that, if necessary, the conveyance to Hall and to the Liverpool and London Assurance Company might be cancelled, and that the premises might be conveyed to the plaintiffs on payment by the plaintiffs of what should be found due from them on taking the accounts, and that in taking the accounts the defendants might be charged with the full value of the mortgaged premises at the present time, or at such other time as the Court might think fit. The Vice-Chancellor was of opinion that there was no reason either in law or under the special circumstances of the case for impeaching the sale, and dismissed the bill with costs. From this decision the plaintiffs appealed.

Mr. Willcock and Mr. T. A. Roberts, for the plaintiffs.—The sale to Hall was really one to the North of England Company, who were second mortgagees and also in possession. A second mortgagee cannot purchase for his own benefit from the first mortgagee. He is in the position of a trustee for the mortgagor; and here we have the additional circumstance that the purchasers were in possession, and had thereby an advantage in getting up the sale, and special means of knowledge. Moreover, they were not simple mortgagees, but trustees for sale, for their security was in that form, and they were, therefore, in a special position of trust. (*Rakestraw v. Brewer*, 2 P. Wms. 511; *Re Bloye*, 1 Mac. & G. 488; *Ex parte Rushforth*, 10 Ves. 409; *Smith v. Chichester*, 1 Con. & Law. 488; *Ex parte James*, 8 Ves. 337; *Downes v. Grazebrook*, 3 Mer. 200; *Ex parte Hughes*, 6 Ves. 617.) The case of *Shaw v. Bunny*, 13 W. R. 374, in which the Lords Justices differed, is the only authority against us. With respect to the question of value: the sale must be treated not as a sale between strangers, but as strictly as any other transaction between persons in a fiduciary relation.

Mr. Giffard and Mr. Kay, for the defendants.—The sale was by auction, and perfectly fair and open. Strangers were present, and purchased several of the lots. The second mortgagees had noth-



ing to do with getting up the sale, which was entirely managed by the first mortgagees.

The right of a second mortgagee to purchase from a first mortgagee is established by *Shaw v. Bunny*, 13 W. R. 374. And there is no distinction between an ordinary mortgage and a security in the form of a trust for sale. In neither case does the mortgagee stand in a fiduciary relation to the mortgagor. (*Parkinson v. Hanbury*, 1 Dr. & Sm. 143; s. c. on appeal, 13 W. R. 331; *Dobson v. Land*, 8 Hare, 216; *Knight v. Marjoribanks*, 2 Mac. & G. 10.)

Mr. Willcock, in reply.

THE LORD CHANCELLOR [LORD CRANWORTH]. This case does not appear to me to present any real difficulty. In the first place, that a mortgagee can purchase from his mortgagor is a matter that is always considered as settled, though, I believe, in some early cases there has been allusion to a doubt on the subject; and Sir Edward Sugden said that the relation between trustee and *cestui que trust*, although in some sense existing between mortgagee and mortgagor, has never been so held to exist as that the mortgagee cannot purchase from the mortgagor.¹ That is not disputed. Then if that is so, why should there be any difficulty on this subject? The real reason why a person standing in the relation of trustee cannot purchase from the *cestui que trust* is, that he cannot purchase that which he is to sell; he has a duty to perform and of course he cannot purchase, for that would be putting himself in a situation in which his interest would become an interest inconsistent with the duty which he has to perform.

The next step is, can he purchase under a power of sale executed by a first mortgagee? It seems to me to follow as a necessary corollary, because the sale that is made under the power of sale by a first mortgagee is substantially a sale by the mortgagor, for it is a sale made under an authority given by the mortgagor paramount to the title of the second mortgagee. It seems to me, that on the principle of the case there is no difference whatever between a purchase from a first mortgagee under a power of sale and a purchase from the mortgagor himself. Even if that were doubtful upon principle, I consider it to have been settled by authority in the case of *Shaw v. Bunny*, because there is no way of getting out of the fact that that case was so decided by the Master of the Rolls, was brought by way of appeal before this Court, and was so decided by the Lords Justices. It is very true that the learned Judge, Lord Justice Turner, expressed some doubt about it, but that does not signify; it is just the same as if the case were brought before a court where there are several Judges sitting, and the majority so

¹See 2 Sugden, V. & P. (8th Am. ed.) 689, and note (v).

decided; and it is by Act of Parliament determined that the affirmation of a decree of the Master of the Rolls, or one of the Vice-Chancellors, by the Court of Appeal, is just the same as if it had been so decided by the full Court. I think it is clear that that has been so settled. Lord Justice Knight Bruce, in affirming the decision of the Master of the Rolls in *Shaw v. Bunny*, decided in favour of the mortgagee's title, "there being no special circumstances" to prejudice his right: the only question is, whether there are any special circumstances here to vary the general rule.

Now the special circumstances relied on were these: First, the mortgagee was in possession. That makes no difference; being in possession could only make a difference if it created an obligation between the mortgagee and the mortgagor which would not have existed if he had not been in possession. Nothing of the sort is suggested; no duty arises on being in possession, except, certainly, to account to the mortgagor in a way onerous to the mortgagee; but there is no duty which would prevent the relation between the mortgagee and his mortgagor different from what would have existed if he had not been in possession. make

Then it was suggested that this was not strictly a mortgage at all; that it was merely a conveyance in trust to sell. It is true that it is in form a conveyance in trust to sell, but as between the mortgagor, the person conveying, and the person to whom it was conveyed in trust to sell, it certainly was a mortgage as far as he was concerned. He took possession, and he taking possession would be liable to account as mortgagee. It cannot be contradicted that between the parties conveying and the parties to whom it was conveyed it certainly was a mortgage. It is possible—I do not say whether that would be so—that there might have been different duties as between him and the mortgagor if he had sold than would have existed in the case of a simple mortgage. But what took place is something that comes in paramount and prior to the exercise of the duties as trustee; he never can sell, because persons having a paramount title to his title choose to exercise that right, and therefore prevent the possibility of his exercising his right, which is a trust only to arise if it was ever in his power to sell, which it was not, in consequence of the sale made by the prior mortgagees.

That being so, the next special circumstance that is alleged here is, that the parties stood in such a situation that we must take this as a sale at an undervalue. It was not urged, indeed it could not be urged, that here there was any undervalue as between third parties, so as to enable them to set aside the sale; but it was said the relation between these parties made that capable of being con-

Simply a combination of principles we have already had.

(1) New lease ensures to benefit of outgor.
Mlgee has not in pos but probably
has evidence that new lease gotten R.
kind outgor's back so to speak, & so
case within case ^{or time while} in that pt.

(2) Purchase by outgor y/eq. or any part
y it must R perfectly fair or equity
will set it aside.

sidered in a Court of Equity an undervalue which would not have been an undervalue as between strangers. That begs the whole question, because the moment you determine that this mortgagee or quasi mortgagee was entitled to purchase, you put him exactly in the position of a common stranger who purchases; so that there is no reason to look at the question of undervalue in a different way from that in which you would have looked at [it] if any third parties had purchased. It would be out of the question to talk of this as an undervalue; it was competed for at an auction. I agree with Mr. Willcock that being sold by auction would not be at all conclusive of the value, but there is no reason to treat this as a sale that was not made in the best manner possible; the vendors had the property valued, and precautions were taken that it should not be sold at an undervalue; it is perfectly true that shortly after the sale it would seem that the persons who had purchased had so far made a good bargain,—it was a very speculative sort of property,—that they had an opportunity of selling it at an advance of 1000*l.*, but that is quite immaterial, and I think, if that objection were to prevail, no sale could be safe, if after lying by for eleven years it was afterwards to be suggested in this way that the property was sold at an undervalue. I think, therefore, that the suggestion of undervalue fails entirely, and that that is not a matter that ought to influence my judgment. I think the decision of the Vice-Chancellor perfectly right, and consequently that this appeal ought to be dismissed with costs. *1808*

*They owned a town. He wanted it to deft for 74.12. In 1809. Plaintiff agreed to give up his right in 1/2 the property to deft—received 100*l.*. This 100*l.* was not pd to deft but to landlord as rent. Later deft released town*

HOLDRIDGE v. GILLESPIE. *to landlord & took*

COURT OF CHANCERY OF NEW YORK, 1816. *new lease to T.B. &*

(2 Johns. Ch. 30.) *also a deft. Later deft brought eject. for part of prop. Plaintiff seeks an inj. vs. eject. & to redeem. Held for Plaintiff. The new lease assigned to defendant of*

The plaintiff, being possessed of a lease from B. W. and others, of a farm of about 309 acres (parts of lots 8, 9, and 10, in Crosby's manor), dated in November, 1806, for eleven years, subject to an annual rent of 75 dollars, on the 26th of May, 1808, assigned the lease to the defendant Thomas Gillespie. The assignment was absolute; but the assignee, at the same time, executed a defeasance, declaring that the assignment was made to secure a debt of 74 dollars and 12 cents, due from the plaintiff to Thomas Gillespie, with interest. Part of the land was cultivated and improved. In April, 1809, the defendant T. G. took possession of the improved part of the farm.

outgor since the rule is a sort of trustee. The agreement to give up half is invalid for evident unfairness & undue influence. Plaintiff may release Eject. but agreement must be a fair one.

On the 29th of August, 1809, the plaintiff and defendants entered into an agreement, under seal, by which the plaintiff acknowledged that he had received of the defendants 100 dollars, as a compensation for one-half of his improvements on the lot, and he gave up one-half of the premises to the defendant T. G.; and to secure to T. G. 75 dollars, with interest, together with what might afterwards become due to the defendants, the plaintiff gave up the lease to T. G. until the 75 dollars and interest, and moneys to become due, should be paid, and T. G. engaged to give the plaintiff a good lease for half the farm for eight years from the 1st of February, 1808, subject to the rents, &c.

The plaintiff averred in his bill that the 100 dollars was to be paid by the defendants to the lessors for rent; that after the first agreement he delivered T. B. G. produce of the farm to the amount of 300 dollars, and performed work and services to the amount of 150 dollars; that T. G. went into possession of part, and the defendants had received the profits for 4 years, at the rate of 180 dollars a year; and that a balance was due to him from the defendants; that the defendant T. G., after the first assignment, applied to the lessors, and surrendered up the lease to them, and took a new lease in his own name and assigned it over to T. B. G. The bill prayed for an injunction against an ejectment brought by the defendants, in 1814, to recover possession of part of the premises occupied by the plaintiff, &c.

The defendants admitted that no money was paid to the plaintiff, but that the 100 dollars previously paid by them for rent to the landlords, and for 28 dollars and 34 cents paid for a debt of the plaintiff, were agreed to be the consideration of the agreement of the 29th of August, 1809. That the defendants had previously paid the landlords the 100 dollars, but no acquittance or receipt was given to the plaintiff for the amount. That the defendant T. G. had been in possession since 1809, and made improvements, which were specified; had paid the rent and taxes for the whole farm for the last three years, and that the plaintiff had paid only one-third of the rent for the year 1809. That the plaintiff had never paid the 75 dollars, or interest, and that he owed the defendant T. G. about 175 dollars, &c.; that the defendant occupied a small house and garden, and that the ejectment was brought for the house so occupied by the defendant T. G., but not for the cleared land.

THE CHANCELLOR [KENT]. The bill filed by the plaintiff is in the nature of a bill to redeem, and the plaintiff is entitled to redeem the whole of the premises contained in the lease, and to have the entire advantage of the new lease on such redemption. The renewed lease enures for the benefit of the mortgagor. According to the cases of

may in new
lease & then

Manlove v. Bale, and of *Rakestraw v. Brewer* (2 Vern. 84, 2 P. Wms. 511), the additional term comes from the same old root, and is subject to the same equity of redemption, otherwise hardship and oppression might be practised upon the mortgagor. It is analogous, in principle, to the case of a trustee holding a lease for the benefit of the *cestui que trust*. Courts of equity have said, that if he makes use of the influence which his situation enables him to exercise to get a new lease, he shall hold it for the benefit of the *cestui que trust*. (1 Dow. 269; 1 Ch. Cas. 191; 1 Bro. Ch. Cas. 198.) So, if a guardian takes a renewed lease for lives, the trust follows the actual interest of the infant, and goes to his heirs, or executor, as the case may be. (18 Vesey, 274.) Indeed, it is a general principle pervading the cases that if a mortgagee, executor, trustee, tenant for life, &c., who have a limited interest, gets an advantage by being in possession, "or behind the back" of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust. (Lord Manners, in 1 Ball & Beatty, 46, 47; 2 Ball & Beatty, 290, 298.) The doctrine has been uniform from the decision of Lord Keeper Bridgman, above referred to, in 1 Ch. Cas. 191, down to the most recent decisions. Nor do I think that the agreement of August, 1809, ought to form an obstacle to the redemption of the whole. That agreement bears the mark of undue influence growing out of the first assignment; and contracts of that kind, made with the mortgagor, to lessen or embarrass the right of redemption, are regarded with jealousy, as they are very apt to take their rise in unconscientious advantages assumed over the necessities of the mortgagor. (1 Vern. 8; 2 Vern. 520; 2 Atk. 495; 2 Ball & Beatty, 278.) The general principle is, "once a mortgage always a mortgage;" and though, no doubt, the equity of redemption may be released upon fair terms, yet the fairness and value must distinctly appear. In this case there was no satisfactory consideration for an abandonment by the plaintiff of one-half of his farm. The agreement was false on its face, for the consideration was not paid. A payment of the annual rent to the landlord was no compensation to the plaintiff for half of his farm; and if we can credit the subsequent declarations of the defendants, they regarded the *whole* farm as still subject to redemption. But without placing reliance on sayings of this kind, the paper itself, accompanied with the admission that the consideration was never paid to the plaintiff, is enough to justify me in not regarding that agreement as a valid obstacle to the original right of redemption.

I shall, therefore, direct a reference to a master to take and state an account between the parties, in which the plaintiff is to be

charged with the 74 dollars and 12 cents mentioned in the original defeasance, with interest from that time, and is, likewise, to be charged with all sums of money justly due to the defendants for goods sold, or advances by them, or either of them, made to and for his use, and on his account; and that the plaintiff is to be credited with all payments made, or articles of produce delivered, or work, labor, and services rendered to the defendants, or either of them; and that the defendants are to be charged with the net yearly value of the premises possessed by them, or either of them, during the time of their possession, after deducting the rent and taxes accruing and paid during that period; and that the pleadings and proofs taken in the cause be received as evidence before the Master, and that the question of costs and all other questions be reserved until the coming in of the report.

Decree accordingly.

Mtgee ptg to left. Ptg cd not pay. Exp. brought please at 8 or 9 (2/3 il. value) of ptg. int to sell & pay ptg over plus. Late another like agreement. Drft under HYNDMAN v. HYNDMAN. this sold & lie self

SUPREME COURT OF VERMONT, 1845. *purchased at 1000*

(19 Vt. 9.)

Appeal from the Court of Chancery. The facts, as they appeared from the bill and answer and the testimony taken, were substantially as follows:

In 1832 the orator, being indebted to the defendant and William Hyndman, executed to them an absolute deed of his farm in Barnet and received back a writing of defeasance. The orator received farther advances from time to time, until 1836, when the parties reckoned together the amount due and found it to be \$608.62, and then agreed that the defendant and William Hyndman should have the farm, free from the orator's equity of redemption, at eight hundred dollars; and the defendant accordingly surrendered to the orator the notes due from him and executed to the orator a note for \$191.31, and the orator surrendered his writing of defeasance; but it was at the same time verbally agreed between them that the defendant should sell the farm and the orator should have what was received therefor, above the sum of eight hundred dollars, after paying the defendant for his time and trouble in the business. The orator continued to reside on the premises until the commencement of this suit; and the defendant, subsequent to 1836, leased the premises from year to year to different persons and received the

Bill to redeem. Held for ptg. agreement to give up. Exp'd on record so far as ptg. was. Bill still in that state under power of sale in which case ptg. is not able to opt out of mtg.

Raise no receipt. Pts Ans:

(1) Purchase of eq redeem by mortgage must be perfectly fair. So \$800 sale still left a mortgage.

(2) Mortgagee can't buy under sale under power in his own mortgage. He can't be both seller & buyer. ~~Such~~

But

(3) What is effect of such a sale? Is it void or voidable? Pretty clear that only voidable. Mortgagee need not attack it unless he wishes. Mortgagee could not have it set aside. In Mass

Case, note p. 584, held voidable only & B. F. P. from mortgage gets good title.

O.K. Lender will have the right to avoid it.

rent, until March 30, 1840, when the parties executed an indenture, in which it was recited that the defendant and William Hyndman had paid to the orator \$869.80, as of the date of March 11, 1840, in consideration of which they held a warrantee deed of the premises in question; and it was agreed that the orator should have the use of the farm for one year for the rent of \$78.09, that if he paid the rent and the sum of \$869.80 before March 11, 1841, he should have a deed of the farm, but that if he did not make payment, the defendant should sell the farm at auction on the first day of April, 1841, and should pay to the orator what was received for the farm, above those sums, after paying defendant for his time and trouble. The defendant caused the farm to be sold at auction in 1841 and became the purchaser himself at \$1001.00, and offered to pay to the orator the surplus above the sums specified in the indenture; but the orator would not receive it. Testimony was given tending to prove that the orator was poor, and that the farm was worth \$1100, or \$1200. William Hyndman conveyed his interest in the premises to the defendant before the commencement of this suit.

The orator prayed that an account might be taken of the amount justly due to the defendant, and of the rents and profits of the premises received by the defendant, and that the orator might be permitted to redeem the premises.

The Court of Chancery, REDFIELD, Ch., dismissed the bill with costs from which decree the orator appealed.

The opinion of the court was delivered by

REDFIELD, J. This is an appeal from a decree made by the chancellor of this circuit. When the case was heard in the Court of Chancery, it appeared to me to be one of so much doubt that I did not feel justified in exposing the parties to the expense of taking an account of so long standing, until the necessity for such expense was fully established by the decision of this court. In that view I understand my brethren fully to concur. We by no means justify the practice, sometimes adopted in the Court of Chancery, of allowing appeals upon merely formal decrees, *without hearing*. Such a course is only calculated to increase the number of chancery appeals in this court and delay the final disposition of many of them, without any adequate saving. Every case should be *fully heard* in the Court of Chancery; and then, no doubt, the chancellor may, in his discretion, make a decree with a view of saving needless expense to the parties, in case the Supreme Court should be of opinion the orator cannot prevail.

But upon a full hearing of this case, upon very satisfactory arguments upon both sides, we incline to the opinion that the orator ought to be permitted to redeem. Cases of this kind will always

Eq. Pl.

depend very much upon the determination of the facts. In that particular, one case is not a rule for the determination of any other case (unless the two cases are alike in all particulars, which never occurs), and therefore need not be reported, so far as the facts are concerned.

The points of law here decided are, that when the orator contracted to sell out his equity of redemption to his mortgagee, he is, in this court, entitled to very favorable consideration, on account of the unequal relations in which the parties stood at the time. The one was the superior and the other the dependent. The one had power and resources; the other had neither, but was sore pressed by necessity. In addition to this, the defendant was clearly the mortgagee of the premises for such a sum as it was not in the power of the orator readily to raise. The price was little more than two-thirds the value of the premises. It was agreed that the defendant should sell the premises, and if they brought more than the price paid by the defendant, the plaintiff should have the surplus. Under these circumstances we think the contract must, in equity, still be considered a mortgage, with a power of sale in the mortgagee. It is well settled that in all transactions between the mortgagor and mortgagee the conduct of the mortgagee will be watched very narrowly (4 Kent 143, and note, and cases there cited). This is the language of all the cases, and of all the books, in regard to all purchases made by trustees of the interest of the *cestui que trust*. Such contracts are not positively disregarded in a court of equity; but they are viewed suspiciously and criticised with some degree of severity.

The only other ground upon which the defendant claims to hold the estate free from the plaintiff's equity of redemption is, that in pursuance of the power of sale, he caused the estate to be sold at auction and became himself the purchaser. Such sales have always in the English chancery, and in this country, unless when the matter is controlled by statute, been held voidable, at the election of the mortgagor, or *cestui que trust*, unless he delay for an unreasonable time to make his election, in which case he will be held to have confirmed the sale by his acquiescence.¹ The cases are too numerous upon this point, and there is too little conflict in the decisions, to require an elaborate review of the subject.

The State of New York, by *statute*, allows the mortgagee, in such cases, to become the purchaser, if he conduct the matter with perfect fairness. In that State, therefore, the decisions upon this sub-

¹That an unreasonable delay is fatal to the right, see *Learned v. Foster*, 117 Mass. 365 (1875). For the effect of a transfer to a *bona fide* purchaser, see *Burns v. Thayer*, 115 Mass. 89 (1874).

*held voidable only as B.F.P.
taken freed of equity's vt. no
obj.*

(1) Cf. case p. 574. There held could buy at
Sale by prior notice. Our case is not
dif. in prin. Whether prior notice is
an individual or the state makes
no difference. ⁴⁴⁴ Shd be allowed to
buy if he wishes ^{+ to hold} ~~such prior~~ ^{at his case} notice.
But conflict. See last case in Section.

(2) What did he do in this case? Clearly did not pay off the tax lien but bought it. If he had paid it off then the state would be out of the matter, redemption by paying state wd be impo. & dept here wd still have it to foreclose for amt he paid. But here intree elected to buy lien as he might too it cd be redeemed in usual way.

(v) Suppose a state holds that mortgagee necessarily holds for mortgagor all that he buys. Seems true as it says that ^{that} still ^{and not discharges} ~~and not discharges~~ ^{so as to be no purchase by} the lien. The lien ^{and be taken by} subject to mortgage it to be ^{that and be all} ~~deem~~ whole thing ^{that and be all} mortgagor and have to pay and mortgagee for lien or else he could not have premises freed of lien. But

(4) This? arose. Cd. outgoes are outgo
for amt he pd in buying up lien. In
a state like N.Y. clearly not as he
is for his own benefit & outgo

ject rest upon a somewhat different basis from the English cases. In the former the sale is *prima facie* good, and it is, therefore, incumbent upon the *cestui que trust* to impeach its fairness; but in the latter the sale is always either good or bad, at the election of the *cestui que trust*,—as in the case of a contract of sale between an infant and an adult. The authorities will be found sufficiently referred to and digested in *Davoue v. Fanning*, 2 Johns. Ch. R. 252, and in Mr. Sumner's note to *Whichcote v. Lawrence*, 5 Ves. 740. *Bergen v. Bennett*, 1 Caine, 1, is somewhat of an elaborate case upon this point.

The decree of the Chancellor is, therefore, reversed and the cause remanded to the Court of Chancery to be there proceeded with.¹

*Mtge by plff to deflt assignor. Mtge contain ed cov-
enant to pay all taxes & provided that if unpaid, mtge
might discharge same & collect same & int under
mtge. Taxes were assessed, unpaid, prop. sold for*

WILLIAMS v. TOWNSEND.

COURT OF APPEALS OF NEW YORK, 1865. *one Vile*) *might it*

(31 N. Y. 411.)

This was an action to enjoin the sale of mortgaged premises under a statutory foreclosure.

The plaintiff executed to the defendant's assignor his bond and a mortgage of premises situated in Buffalo, dated the 8th day of February, 1853, to secure the payment of \$2,640, in ten years from the date thereof with annual interest, which mortgage contained a further condition in these words: "and shall also pay all assessments, taxes and charges on the said premises to be charged on the same, and in case of default in paying the same, the said parties of the second part and their representatives may discharge such assessments, taxes and charges, and collect the same with interest from the time of such payment under this mortgage, in the manner particularly specified in the condition of a certain bond or obligation bearing even date herewith, &c." The condition of the bond, so far as it relates to the question in this case, was in these words: "and shall also pay all assessments, taxes and charges on the prem-

¹ *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48 (1828); *Benham v. Rowe*, 2 Cal. 387 (1852); *Mapps v. Sharpe*, 32 Ill. 13 (1863); *Garland v. Watson*, 74 Ala. 323 (1883), accord. Compare *Montague v. Davies*, 14 Allen (Mass.) 369 (1867), and *Fair v. Brown*, 40 Iowa, 209 (1875). See *The Howards v. Davis*, 6 Tex. 174 (1851); *Trimm v. Marsh*, 54 N. Y. 599 (1874), s. c. page 299, *supra*, and New York Code Civ. Proc. § 2394, for the contrary doctrine.

*close for the amt. That deflt was mtgee did
not pursue her trying tax lien. Mtgee is
not trustee so as to include all action
is mtgee.*

ises described in the mortgage bearing even date herewith and collateral hereto, and in case of any default in paying the same, the said" (obligees) "may discharge said assessments, taxes and charges, and collect the same with interest from the time of payment as part of this bond, and the said mortgage." The mortgage contained a power of sale, providing that if default should be made in the payment of all or any part of the said principal sum of \$2,640, "or of the assessments, taxes and charges as aforesaid, or of the interest thereof, at the time or times when the same ought to be paid," then and in such case the mortgagees were empowered to sell the premises at public vendue, &c. "And out of the moneys arising from such sale or sales, to keep and retain in their hands the said sum of two thousand six hundred and forty dollars, together with such assessments, taxes and charges as shall have been paid by them, together with all costs, charges and expenses, on account of such sale or sales."

In 1856 the city of Buffalo assessed upon the said mortgaged premises taxes amounting to thirty-three dollars and sixty-six cents, for which the premises were sold at auction by the comptroller of said city on the 27th day of May, 1857, for taxes, interest and expenses, then amounting to \$36.75. The premises were bid off by one M. E. Vile for the term of five hundred years, and certificates pursuant to the provisions of the charter of said city were issued to him by said comptroller, in his name. Vile was, in fact, the agent of the defendant, who was then the assignee of the mortgage, and bid off the said premises for her, taking the certificates in his own name, as he testified, "for convenience of transfer."

On the 1st of August, 1857, the defendant, by her attorneys, commenced a foreclosure under the statute by advertisement in one of the Buffalo papers, which advertisement properly described said mortgage, &c., and claimed to be due thereon "\$2640 and interest thereon from February 8, 1857; and also the sum of \$36.75, with interest thereon from March 27, 1857." There was, in fact, no part of the principal of said mortgage or of interest thereon then due and unpaid. Before the day of sale mentioned in said advertisement the plaintiff paid to the comptroller of the city of Buffalo the amount legally necessary to redeem the premises from such tax sale; and defendant refusing to discontinue the proceedings of foreclosure, the plaintiff commenced this action to restrain her from selling said premises.

The court at Special Term held as a question of law "that the purchase by the defendant at the tax sale, and the taking and holding by her of the tax certificate, did not discharge the assessment, taxes or charges for which said premises had been sold at such

gets nothing. But if he has to hold
tax lien for mortgage then he shd have
recompense from mtgor. It was so held
in an Iowa case. In that case was
payment of lien a cond. of redemption
that seems clearly right. Seems also
mtgor cd see for amt pd to buy
lien. If he is made a trustee of
it, is his will he shd have compensa-
tion. Cd he add it to his debt
on foreclosure? Clearly could under
such a ridge as was given in our
case. Seems shd be allowed to
where no such agreement. If he
had paid it off he cd add amt
pd to debt & foreclose. When state
holder that buying it is for bene-
fit of mtgor seems no reason
for not allowing same privilege.

(5) Has been argued that mtgor is
under duty to pay taxes. because his int.
is subject to them. That duty seems
owing to state. No duty to mtgor.
Mtg pays partially to protect his int. But
why cant he pay also partially to acquire
an abs. interest?

sale;" and that "the defendant was not entitled to enforce the repayment of the amount paid on such purchase as a part of the condition of said mortgage," and ordered judgment for the plaintiff.

The judgment was affirmed by the General Term of the 8th District.

DAVIS, J. By the condition of the bond and mortgage the defendant undoubtedly had a right, after failure by the plaintiff to pay the taxes assessed on the mortgage premises, to pay and discharge the same, and thereupon to collect the amount so paid by suit upon the bond or by foreclosure of the mortgage. And the principal question in this case is, whether the purchase of the premises at the tax sales and the taking certificates of such purchase under the provisions of the charter of Buffalo, were a discharge of the assessments and taxes, within the true construction of the bond and mortgage.

By section 20 of title 5 of the charter of the city of Buffalo, as revised by the Laws of 1856, it is provided that the owner of any real estate sold for taxes may at any time before a declaration of sale is granted, as elsewhere provided by the charter, redeem the same by paying to the city treasurer, for the benefit of the holder of such certificate, the amount paid by him with the addition of fifteen per cent. per annum on such amount.

The certificates are transferable; and it cannot always be easily ascertained who the holder is. Hence the statute has provided that the redemption may be made by payment to the city treasurer. In all cases of sales for taxes the owner of the land is clothed by law with this right of redemption; and the tax, together with the expenses of the sale, remain a lien on the premises assessed, with an addition thereto of fifteen per cent., until the redemption or payment to the treasurer is made. The effect of the sale is therefore merely an assignment of the lien of the tax and the expenses then incurred, enhanced by the additional per centage; and this lien continues till the owner of the land makes the redemption, or the holder of the certificate takes title to the property in the prescribed form. It is therefore clear that the tax or assessment is not discharged by the sale and certificate. In this case the purchase at the tax sale was made by M. E. Viele, and the certificates of the comptroller were made to him, as he says, "for convenience of transfer." He was in fact the agent of defendant, but there was nothing in the manner of sale or form of the certificate to indicate that fact. The legal rights of the parties are perhaps the same as though the certificate had been made to the defendant; but it would certainly be very embarrassing to titles of real estate if the owner's right of redemption were dependent upon some undisclosed rela-

tion of agency between the apparent purchaser and the incumbrancer of the land. There would be no safety for him if he were not allowed to redeem; because the ostensible purchaser could transfer the certificate to a *bona fide* holder and subject him to great embarrassment and perhaps to the loss of his land. A mortgagee who desires to pay off taxes or assessments and charge them on the mortgaged premises has a very plain course to pursue. At any stage of the proceedings he can step forward in his character of mortgagee and pay the assessment or redeem from a sale before the purchaser's title has actually ripened by a conveyance under the law. It is no hardship to require him to do this in a plain and distinct manner, so as not to embarrass the title of the mortgagor or owner. When, however, he purchases at a tax sale and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law.

But it is insisted that the purchase and taking of the certificate by a mortgagee, who has the right by the terms of his mortgage, or under the general statute, to pay off taxes and add the amount so paid to the lien of his mortgage, is by operation of law, *ipso facto*, an extinguishment and discharge of the tax. To support this proposition the familiar principle that a person who is placed in a situation of trust or confidence in reference to the subject of the sale, or has a duty to perform which is inconsistent with the character of a purchaser, cannot be a purchaser on his own account. (*Torrey v. The Bank of Orleans*, 7 Paige, 649; *Van Epps v. Van Epps*, 9 Paige, 257; *Burhans v. Van Zandt*, 3 Seld. 523.)

But this principle has never been carried so far as to prevent a junior mortgagee from purchasing the subject matter of the mortgage at a sale under a prior lien; nor has it been held that a title fairly purchased at such sale was held for the benefit of the mortgagor. A mortgage is a mere security for a debt; and there is no such relation of trust or confidence between the maker and holder of a mortgage as prevents the latter from acquiring title to its subject matter, either under his own or any other valid lien. The defendant had no duty to perform to the plaintiff or toward the mortgaged premises that precluded her from buying at the tax sale. She was under no obligation to pay the taxes. The plaintiff had covenanted that she might do so at her option, and thereby acquire certain rights; but she had not undertaken to do it nor subjected herself to any burthen or obligation whatever in respect to the assessments or taxes. She might pay them or not, as she

chose, or she might stand upon her general rights and purchase at the tax sale, as others could do, for the purposes of investment or protection. But if this were not so, all that the principle sought to be invoked would require is that as purchaser she should take a redeemable interest only which never could ripen as against the mortgagor into a greater one, and not that the lien she purchased should be discharged or extinguished, leaving her to no remedy except the possibly inadequate one under the covenants of the bond and mortgage. It is my opinion, therefore, that the purchase at the tax sale did not operate to discharge the assessment and deprive the plaintiff of his right of redemption under the statute.

But it is urged that the failure of plaintiff to pay the tax was a breach of the condition of the mortgage, and gave defendant a right to foreclose and collect the whole amount secured. There is no clause of the mortgage making the whole sum due on failure to pay the interest, or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises does not have the effect claimed for it; nor do I think it would countervail the provision of the statute which requires a sale in parcels, when that is practicable, and prohibits a sale of more than sufficient to pay the amount actually due with the expenses of sale. (3 R. S., 5th ed., p. 860, § 6.) But no right to foreclose would accrue upon a simple failure of the mortgagor to pay the taxes; to give that right it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax, otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this, for it provides that "*such assessments, taxes and charges as shall have been paid by them*" may be retained.

Besides, in my judgment, a mere naked breach of such a covenant in the condition of a mortgage, without the payment of any amount, would give no right to commence a foreclosure under the statute; but this it is not necessary to determine.

I think the judgment should be affirmed.

Judgment affirmed.

Stewart owns Congress Hall Subject to Mortgage held by deft & to a Lien held by St. Apr. 22/60
Stewart utters the prof to deft to secure him for going surety. Aug. 62 deft now made little as surety. Dec. 62 prof has sold under. Ch. J. above & Craig brought EQUITY RELATIONS.

it for St. P. T. claiming TEN EYCK v. CRAIG.
under Stewart & such
to redeem. Held COURT OF APPEALS OF NEW YORK, 1875.
for deft. The only under Rk. (62 N. Y. 406.)

Appeal from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiff entered upon a decision of the court upon trial without a jury. (Reported below, 2 Hun., 452; 5 T. & C., 65.)

This action was brought to redeem certain real estate known as "Congress Hall," in the city of Rochester, from incumbrances held by the defendants as executors of the estate of John Craig, deceased, and for an accounting of the rents and profits.

The facts as found by the trial court are substantially as follows:
On the 23d of April, 1860, Nelson P. Stewart, then being the owner in fee of the premises, executed a mortgage thereon, and on a farm in Erie county, to the defendant John Craig, to indemnify him for becoming Stewart's surety in an undertaking made to stay proceedings on a judgment recovered in the Supreme Court on the 24th day of October, 1859, in favor of Maria L. Dehon, executrix, against Stewart, for \$10,184.83, on an appeal taken by Stewart from said judgment. At the time of the execution of said mortgage said Congress Hall property was subject to three prior mortgages, amounting to about \$19,000, two of which were then owned by the defendant Craig, and the third by Asa Sprague, who subsequently transferred it to Craig. The said property was also subject, at the time of the execution of said indemnity mortgage, to a lease executed by Stewart to Robert D. Cook, for the term of five years from the 1st day of May, 1860, at a rent of \$3600 a year, payable monthly in advance. On the 24th of April, 1860, Stewart assigned said lease and the rents payable thereon to Craig, as further indemnity for his becoming surety as above stated, by an instrument in writing.¹

Craig was made liable as surety, and was compelled to and did pay \$12,301.24 on said undertaking on the 7th of August, 1862. Craig foreclosed his indemnity mortgage, so far as it related to the property in Erie county, and realized therefrom the sum of \$2615.88. At the time when Craig signed said undertaking, and took said indemnity, said Congress Hall property was subject to a judgment theretofore recovered in the Supreme Court in favor of the Madison County Bank, or the trustees thereof, against Stewart, for the sum of \$2500 and costs, of the existence of which judgment Craig was ignorant at the time. On being informed of it he re-

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SEC. V.]

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used to justify as a surety to said undertaking, unless he was indemnified against said judgment, and therefore Stewart executed a bond, dated the 1st day of June, 1860, and procured the same to be executed by George K. Johnson and the defendant Elisha C. Litchfield, as his sureties, in the penal sum of \$5000, conditioned to protect said Congress Hall property against the judgment last above mentioned, which bond was delivered to Craig, and he then justified as surety to the undertaking given on appeal. On the 5th day of December, 1863, Craig recovered a judgment on said last mentioned bond against Litchfield for \$5179.69, which judgment Litchfield paid to Craig. On the 17th of December, 1860, the Congress Hall property was sold on an execution issued upon said judgment in favor of the Madison County Bank, and was bid off at such sale by the defendant Craig for the sum of five dollars. On the 17th of March, 1862, Daniel W. Powers, by virtue of a judgment recovered by him against Stewart on the 26th of January, 1860, for \$1481.78, redeemed the Congress Hall property from said sale, and on the 21st of March, 1862, the sheriff, in completion of such sale, executed a deed of said property to Powers. On the 7th of May, 1864, Powers, by deed of that date, conveyed said property to the defendant Craig, in consideration of the sum of \$1753.53 paid by Craig. The judgment under which Powers redeemed had been sold and assigned by him before the redemption, and on the 10th of April, 1860, to Oliver M. Benedict, of Rochester, in consideration of the amount then due on the judgment, paid by Benedict to Powers at the time. On the day of the redemption, to wit, the 17th of March, 1862, Benedict reassigned the judgment to Powers, without any valuable or valid consideration. At the time of each of those assignments, and for several years next preceding that time, Benedict was the attorney of Stewart, and was his confidential adviser. He purchased said judgment and took the assignment of it in his own name, at the request of Stewart. And the money which he paid for it to Powers was furnished by Stewart, or was replaced by him immediately after such payment, in pursuance of an arrangement between him and Benedict made before the money was paid by Benedict. There is no evidence that the assignment of the judgment from Benedict to Powers was authorized by Stewart, or that he knew of it. Craig, when he took the deed from Powers, had knowledge of the facts as to the relations between Benedict and Stewart, and as to the assignment of the judgments.

On the 27th of April, 1860, Stewart and his wife conveyed "Congress Hall" to Henry K. Sanger, by deed, subject to the several mortgages above stated, except the indemnity mortgage. Sanger died previous to July, 1864, leaving a will by which he gave to his

wife all his estate, real and personal, and named her as sole executor. She, as devisee and executrix, conveyed Congress Hall to the plaintiff Henry Ten Eyck, by deed dated 3d of January, 1867.

On these facts the court decided as matter of law, among other things, that the defendant Craig, on entering upon the collection of the rents on the assignment of the lease of the Congress Hall property, was in the position of a trustee for Stewart, in respect to the leased property, and his purchase of the same while he occupied that position inured to the benefit of the *cestui que trust*, at his election. That when Benedict held the judgment under which Powers redeemed, he held it in trust for Stewart. Powers, as the assignee of Benedict, without consideration, took Benedict's right in the judgment and no more. When Powers redeemed he took the land subject to the trust which attached previously to the judgment in his hands. That Craig was chargeable with notice of said trust. That Stewart, while he owned the Congress Hall property, had the right to redeem the same, on paying to Craig the amount of his liens and advances, over and above his receipts. That the plaintiff Ten Eyck, by means of the successive conveyances above stated, has succeeded to such right of Stewart to redeem said property, and is entitled to redeem.

See note
bottom of
page. Not
discussed
further.

ANDREWS, J. . . . It will be convenient in examining the questions which arise in the case to leave out of view for the present the facts relied upon as establishing a trust relation between Craig and Stewart, which disabled Craig from acquiring a title to the property hostile or adverse to Stewart or his grantee, and to consider the position of Sanger and his relation to the property after the sale and conveyance by the sheriff, upon the assumption that Craig as purchaser on the sale and the grantee of the redemption title was unaffected by any special disability, and acquired the same rights through the sale and the subsequent proceedings as if at the time of the purchase he had been a stranger to Stewart and Sanger, owing them no duty and bound by no obligation to protect the equity of redemption. It is not claimed that there was any fraud or irregularity in the sale on the bank judgment. The judgment was unpaid; the sale was open and fair, and so far as appears was not procured by the intervention of Craig. The sum bid, so far as appears, was at the time the full value of the interest of Sanger in the property. There is nothing which in any manner tends to impeach the *bona fides* of the sale. It is claimed, however, that the redemption was void, on the ground that the judgment under which it was made had been paid by Stewart, the judgment debtor, before the redemption, and was not at the time a lien upon the land.¹

¹ The discussion of this point is omitted. The learned judge reaches the conclusion that no right of redemption remains in Stewart or his grantees.

The next and principal question to be considered is, whether Craig, at the time of the sale, occupied such a relation to the property, or to Stewart or Sanger, that he was disabled from purchasing for his own benefit, and claiming the title adversely to them. If he occupied that relation, he cannot set up any right acquired as purchaser on the sheriff's sale in bar of their right to redeem. Purchases by trustees, or persons occupying fiduciary positions, in contravention of their trust or duty, are held in equity to be made for the benefit of the *cestui que trust*, at his election. No irredeemable title can be acquired upon such a purchase. And if the purchase by Craig was within the principle which prohibits a purchase by a trustee, it is an immaterial circumstance that the time within which a statutory redemption might have been made has expired. The right of redemption exists in favor of the *cestui que trust* and those in privity with him, independently of the statute, upon general principles of equity, and may be enforced at any time within the period allowed by the statute of limitations, or the rule of courts of equity regulating the jurisdiction.

The rule which prohibits a trustee from purchasing the property of a *cestui que trust* stands upon the proposition stated by the chancellor in *Whichcote v. Lawrence*, 3 Ves. 740, that one who undertakes to act for another in any matter shall not in the same matter act for himself. It applies in all cases where the duty which the trustee has to perform in respect to the property is inconsistent with his becoming a purchaser for his own use. And the purchase will not be allowed to stand, although the court may not be able to discover any wrong intention on the part of the trustee, or that he has gained any advantage in the transaction. The rule is inflexible, that he shall not place himself in a position where his interest is or may be in conflict with his duty. The reason of the rule, as remarked by Kent, J., in *Bergen v. Bennett*, 1 Cai. Cas. 19, is to bar the more effectually every avenue to fraud. Such a purchase, though it may not originate in any purpose to defraud, is a constructive fraud, because the natural tendency is mischievous and harmful. The rule is founded in the highest wisdom. It recognizes the infirmity of human nature, and interposes a barrier against the operation of selfishness and greed. It discourages fraud by taking away motive for its perpetration. It tends to insure fidelity on the part of the trustee, and operates as a protection to a large class of persons whose estates, by reason of infancy, infirmity, or other causes, are intrusted to the management of others. The rule is not limited in its application to those who are trustees strictly, holding the legal title to the thing purchased. (*Van Epps v. Van Epps*, 9 Paige, 237.) It applies to agents and persons standing

in relations of trust and confidence to others, which involve duties inconsistent with their dealing with the property as their own. The books are full of cases illustrating its application, and it will be sufficient to refer to a few of them. (*Fox v. Mackreth*, 2 Bro. C. C. 400; *Oliver v. Court*, 8 Price, 127; *Van Horne v. Fonda*, 5 J. Ch. 388; *Van Epps v. Van Epps*, *supra*; *Moore v. Moore*, 5 N. Y. 256; *Gardner v. Ogden*, 22 id. 327; *Michoud v. Girod*, 4 How. [U. S.] 506.)

It is claimed that Craig was disabled from purchasing the Congress Hall property at the sheriff's sale, and holding it adversely to Stewart and Sanger, under the rule just adverted to. There are two grounds upon which this claim is based: First, that Craig at the time was mortgagee in possession; and, second, that the relation of trustee and *cestui que trust*, in respect to the property, was created between Craig and Stewart by the instrument of April 24, 1860, which precluded him from purchasing for himself, or otherwise than as a trustee for Stewart, or his grantee. Assuming that the learned counsel for the plaintiff is correct in the position that Craig, at the time of the sheriff's sale, stood, in relation to the premises, in the character of mortgagee in possession, the question arises, whether a mortgagee in possession can buy the mortgagor's title on an execution sale, upon a judgment in favor of a third person against the mortgagor, and set up a title under the sale, as a defence to an action by the mortgagor to redeem. Another mode of stating the question is: Is a mortgagee in possession a trustee for the mortgagor, so that he will not be allowed to buy in the equity of redemption on a sale upon an independent lien held by a third person?

i.e. the assignment of the lease

main?

Unless the mortgagee in possession is a trustee for the mortgagor, there is no ground upon which he can be precluded from purchasing. It is clear that no trust relation between the mortgagor and mortgagee is created by the execution of the mortgage, unaccompanied by possession. The mortgage under our law is a security merely. The mortgagee has, by virtue of his mortgage, no estate in or title to the land, or the right of possession, before or after the mortgage debt becomes due. He owes the mortgagor no duty to protect the equity of redemption. The power of sale which usually accompanies a mortgage is given to enable him, by an adverse proceeding, to sell the equity of redemption for the payment of the mortgage debt. The objection that he could not become the purchaser at his own sale under the power has been removed by the statute when the foreclosure is by advertisement (2 R. S. 546, § 7); and a provision is inserted in every decree for the sale of mortgaged premises, unless otherwise specially or-

dered, that the plaintiff may become the purchaser. (Rule 73.) And he may buy in any outstanding title and hold it against the mortgagor (*Cameron v. Irwin*, 5 Hill, 280; *Williams v. Townsend*, 31 N. Y. 415; *Shaw v. Bunny*, 13 Week. R. 374; s. c., 2 De G., J. & S. 468.)

There is, in truth, no relation analogous to that of trustee and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. The mortgagee is not a trustee of the legal title, because, under our law, he has no title whatever. (*Kortright v. Cady*, 21 N. Y. 342, and cases cited.) He may deal with the mortgagor, in respect to the mortgaged estate, upon the same footing as any other person; he may buy in incumbrances for less than their face, and hold them against the mortgagor for the full amount; he may do what any other person may do, and his acts are not subject to impeachment, simply because he is mortgagee. (*Darcy v. Hall*, 1 Vern. 48; *Knight v. Marjoribanks*, 2 Mac N. & G. 10; *Chambers v. Waters*, 3 Sim. 42; 3 Sug. on V. and P. 227.)

Nor is the mortgagee converted into a trustee by taking possession as mortgagee of the mortgaged property, so as, in general, to prevent his purchasing an outstanding title, or under another lien. Under the English law he has the right to the possession, because he has the legal title to the land. Under our law he cannot obtain possession until foreclosure, except by the consent of the mortgagor, because until that time he has no title. A mortgagee is often called a trustee, and in a very limited sense this character may be attributed to him. There may be a duty resting upon a mortgagee in possession to discharge a particular claim against the land. If in such a case he omits to do it, and allows the land to be sold on such a claim, and becomes the purchaser, he would hold the title in trust for the mortgagor. A mortgagee in possession is allowed, and it may be his duty to pay taxes on the land out of the rents and profits. If he suffers the land to be sold for taxes in violation of his duty, and purchases on the sale, he would upon general principles be deemed to hold the title as trustee. So, if a mortgagee is allowed to take possession and undertakes to pay the interest on other liens out of the rents and profits and fails to do so, he could not purchase the land for his own benefit in hostility to the mortgagor on a foreclosure of an incumbrance for non-payment of interest which he was bound to pay. A mortgagee in possession is bound to account for the rents and profits; and in that respect, as was said by Shaw, C. J., in *King v. Insurance Co.*, 7 Cush. 7, he may be denominated a trustee. But, except in some special sense, that is not the relation he bears to the mortgagor. The relation of mortgagor and mortgagee is explained in the admirable judgment of Sir Thomas Plumer, in

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the leading case of *Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 183. He says: "It is only in a secondary point of view and under certain circumstances, and for a particular purpose that the character of a trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication in subordination to the main purpose of it, and after that is fully satisfied its primary character is not fiduciary." And again: "The mortgagee when he takes possession is not acting as a trustee, but independently and adversely for his own benefit." A mortgagee in possession may purchase from a prior mortgagee and get an irredeemable title. (*Kirkwood v. Thompson*, 2 De G., J. & S., 613, and cases cited; *Parkinson v. Hanbury*, 2 D. & S. 143; s. c., 2 De G. & S. 450; see also, *Shaw v. Bunny*, *supra*; *Knight v. Marjoribanks*, *supra*.) Lord Cranworth, in *Kirkwood v. Thompson*, referring to the fact that the mortgagee at the time of the purchase was in possession, says: "That makes no difference; being in possession could only make a difference if it created an obligation between the mortgagee and mortgagor, which would not have existed if he had not been in possession. Nothing of this sort is suggested; no duty arises on being in possession except to account in a way onerous to the mortgagee."

A mortgagee in possession is sometimes spoken of as a tenant and as having the legal rights of a tenant. (2 Wash. 150.) The analogy is not very close between the two relation; but it is difficult to see any reason for denying the right of a mortgagee to purchase and hold adversely to the mortgagor in a case when a tenant in possession would be allowed to purchase and hold against the landlord; and yet a tenant may purchase the demised premises on a sale on execution against the landlord, and when his title is perfected, may set it up in bar of a recovery for rent thereafter accruing on the lease. (*Nellis v. Lathrop*, 22 Wend. 121.)

The first ground stated upon which it is claimed that Craig was disabled from purchasing on the sheriff's sale, viz., that he was the mortgagee in possession, cannot, I think, be supported; and it remains to consider whether such disability existed by reason of the agreement of April 24, 1860. The purpose of that agreement was to secure Craig for becoming surety for Stewart on the undertaking on the appeal from the Dehon judgment. This purpose is recited in the instrument. The object was the protection of Craig; and if any trust in favor of Stewart resulted from the provisions of the instrument it was incidental and collateral to its primary intent.¹

I am unable to discover any duty arising out of the contract of April 24, 1860, or the circumstances resting upon Craig which de-

¹This part of the opinion is omitted.

where prior
mortgagee sells
under a power

Tenant

OK. He
cd by.

barred him from purchasing, on his own account, on the execution sale. He was, in some sense, a trustee of the rents received under the arrangement, and was bound to dispose of them as required by the agreement, and this was the extent of his duty. He was not bound to protect Stewart against the loss of the rents through a sale of the land on the bank judgment. If a mortgagee in possession may purchase for himself on a foreclosure of another mortgage, or buy in an outstanding title, then *a fortiori* could a person in the position of Craig. The mortgagee under the English law has the entire legal title, and so far as he is regarded as trustee, the trust is the whole interest of the mortgagor. Craig at most was a trustee of the rents for a term only. He had by the agreement no interest as trustee or otherwise in the fee which he purchased on the execution sale.

The conclusion which I have reached is adverse to the existence either in Stewart or Sanger of a right to redeem, and it becomes unnecessary to consider whether, assuming such right to exist, the plaintiff, as grantee of Mrs. Sanger, succeeded to it. The rule which avoids purchases made in violation of his duty at the election of the *cestui que trust* is a valuable one and ought not to be impaired by engrafting upon it exceptions, or indulging in subtle refinements and distinctions to withdraw a particular case out of its influence. But after careful consideration, I am unable to perceive that the facts of this case bring it within the rule, and am therefore of opinion that the order should be affirmed, and judgment absolute given for defendants, pursuant to stipulation, with costs.

All concur, except Church, Ch. J., not voting. Folger, J., not sitting.

*Order affirmed, and judgment accordingly.*¹

¹ The cases generally are accord. But see *Harrison v. Roberts*, 6 Fla. 711 (1856); *Walthall's Ears. v. Rives*, 34 Ala. 92 (1859), and *Roberts v. Fleming*, 53 Ill. 196 (1870), *semble*, limiting the doctrine of the principal case to a sale under a judgment of a third person having a lien paramount to that of the mortgage. Compare *Griffin v. Marine Co.*, 52 Ill. 130 (1869).

Really cases above make no limitation. Do so qualify statement but any consid of whether such a qualification was nec was entirely lacking. If can buy title Superior to mortgage surely can buy one subject to mortgage.

HALL v. WESTCOTT.

SUPREME COURT OF RHODE ISLAND, 1886.

(15 R. I. 373.)

Bill in equity to redeem a mortgage and for an account.

DURFEE, C. J. The bill states that on October 23, 1873, Walter J. Reynolds, being the owner of a lot in Providence, mortgaged it for \$800 to Stephen H. Williams; that subsequently the lot passed by mesne conveyances to Charles W. Adams, who, December 30, 1874, gave two mortgages thereon to Hiram C. Pierce, to wit, one for \$3250, and one for \$500, subject to the mortgage for \$3250; that the mortgage for \$3250, though taken solely in Pierce's name, belonged equally to him and the complainant Harriet Hall; that Pierce assigned the mortgage for \$3250 to the defendant Charles A. Westcott, who thereupon, January 23, 1875, gave the complainant Harriet Hall a writing in which he declared that he held said mortgage as to one-half in trust for her; that said Pierce subsequently assigned said mortgage for \$500, and his interest in said mortgage for \$3250 to said Harriet, and that said mortgage for \$500 contained a power of sale under which, in January, 1882, said Harriet duly sold the estate, buying it herself under notice as authorized by statute. The bill alleges that the defendant is in possession, and contains other allegations. It asks for an account and for leave to redeem. The defendant sets up several defences.¹

The third defence is that the mortgaged lot was sold for the non-payment of taxes, and bought by and conveyed to the defendant. This raises the question whether a mortgagee or his assignee, out of possession, can become a purchaser at a tax sale with the same effect, as against the mortgagor and other mortgagees, as if he were a stranger to the estate. There is some conflict of authority on this point. All the cases agree that there are persons who stand in such relations to the estate that they cannot purchase as if they were strangers. No person whose duty it is to pay the tax can be permitted to purchase at a sale for its non-payment, and acquire a good title as against others who are interested in the estate, since to permit him to do so would be to permit him to profit by his own default. Under this rule mortgagors, mortgagees in possession, life tenants, and tenants obligated by contract to pay the taxes, are incapacitated to become purchasers. The incapacity has likewise been held to extend to tenants in common, for, if the estate is sold for taxes to one of the tenants, it is sold for his default as well as

¹The consideration of the first and second defenses is omitted.

Reynolds made a note to Williams of which debt is assigned. Pierce has succeeded by notes, sold under one of them & purchased to rights of Reynolds. She sells to redeem. Debt sets up that land was sold for tax. She bought it. Held no defence. Mortgage out of possession not subject by purchase at Tax Sale. No under no duty to pay he has a right to pay & redeem if another brought. All have a common interest & one cannot buy for others.

Represents minority view.

Can outgor buy at tax sale & hold vs
outgee? No

(1) is presumption that outgor is doing it
not to gain a new title - but to protect his
own title. Not true as to outgee. -

(2) Outgor is person primarily liable to
pay. If he pays we can collect them
or if no one: if outgee pays outgor -
must reimburse him.

(3) Is there merger of tax title in fee?

(4) Doesn't outgee get the tax-title, i.e. a
outgee in it, by estoppel?

for the default of his co-tenants. (*Page v. Webster*, 8 Mich. 263; *Butler v. Porter*, 13 Mich. 292; *Cooley v. Waterman*, 16 Mich. 366; *Cooley on Taxation*, 346, 347.) So a person who occupies a fiduciary relation as regards the estate, cannot purchase it for himself. The trust in the one half of the mortgage for \$3250 is protected under this rule. And there are cases which enounce, or at least presuppose, a still broader doctrine, which may be stated thus, namely: that a purchaser who has an interest in the estate, such as would entitle him to redeem it if sold to another, will be presumed to have purchased it for the protection of that interest, or to save it from sacrifice, and will be required to hold it, even after the statutory period for redemption has expired, simply as security for his reimbursement. We find this doctrine nowhere more clearly asserted than in *Fair v. Brown*, 40 Iowa, 209. The defendant there was interested in the estate by judgment lien and as a second mortgagee. He bought certificates of sale for taxes, and subsequently took the tax deed. The court held that the prior mortgage was not defeated. "The land," says the court, "is a common fund for the payment of the plaintiff's," i. e. the prior mortgagee's, "mortgage and the defendant's liens. Defendant was authorized to redeem from the tax sale. Equity will not permit him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling incumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his liens. He cannot obtain that protection by pursuing a course that will deprive the mortgagee of his security, and leave the mortgagor to sustain the weight of the liens, which are personal judgments, after being deprived of his property by tax title. (*Garrettson v. Scofield*, 44 Iowa, 35; *Porter v. Lafferty*, 33 Iowa, 254; *Stears v. Hollenbeck*, 38 Iowa, 550.)" In *Middletown Savings Bank v. Bacharach*, 46 Conn. 571, the defendant, having had an undivided eighth of an estate subject to a mortgage set out to him under an execution, purchased the estate at a sale for taxes assessed before he became interested in it, and the court held that he could not set up the tax title to defeat the mortgage, he being entitled to redeem the mortgage, which yet he could not do, if the mortgagee had paid the taxes, without reimbursing him. The court also said that the mortgagee was similarly incapacitated, because he could pay the tax and add the amount of it to the mortgage debt. In *Connecticut Mut. Life. Ins. Co. v. Bulte*, 45 Mich. 113, the court lays down the doctrine that where a mortgagee, or one of two or more mortgagees, purchases the estate at a tax sale, the purchase may be treated as payment. "It is as just and as politic here," says the court, "as it is in the case of tenants in common, to hold that the purchase is

a payment of the tax." In the later case of *Maxfield v. Willey*, 46 Mich. 252, the court affirms the doctrine. "When the mortgagee," says the court, "instead of making payment of the taxes, makes a purchase of the land at tax sale, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid with interest." The opinions in these cases were delivered by Judge Cooley, who, in the preparation of his book on Taxation, had occasion to make the subject a special study.

The most recent case which we have met with is *Woodbury v. Swan*, 59 N. H. 22, in which the Supreme Court of New Hampshire decided that the holder of a mortgage cannot defeat a prior mortgage by acquiring a tax title. The court rest their decision on the following reasons, as declared by Bingham, J., in delivering the opinion of the court: "Mortgagor and mortgagee have a unity of legal interest in the protection of their titles against sale for the non-payment of taxes, and against outstanding tax titles; and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles. Therefore the mortgage contract comprises an implied agreement that, while either party may buy a tax title for the preservation of his right in the mortgaged property, neither of them will buy a tax title for the extinguishment of the title, in the maintenance of which they, as well as partners and tenants in common, are in law jointly concerned. The common interest of these parties in the mortgaged property creates a relation of trust and confidence."

Other cases may be cited which support the same view, though not always for the same reasons. (*Moore v. Titman*, 44 Ill. 357; *Harkreader v. Clayton*, 56 Miss. 383; *Haskell v. Putnam*, 42 Me. 244; *Bassett v. Welch*, 22 Wisc. 175; *Whitney v. Gunderson*, 31 Wisc. 359, 379; *Chickering v. Failes*, 26 Ill. 507; *McLaughlin v. Green*, 48 Miss. 175.) In California it is held that a person who is under any obligation, either moral or legal, to pay the taxes, cannot become a purchaser. (*Moss v. Shear*, 25 Cal. 38; *Christy v. Fisher*, 58 Cal. 256.)

Other cases adopt a narrower view, and maintain that any person can become a purchaser who is not under any legal duty to pay the taxes. (*Williams v. Townsend*, 31 N. Y. 411; *Waterson v. Devoe*, 18 Kans. 223; *Bettison v. Budd*, 17 Ark. 546; *Ferguson v. Etter*, 21 Ark. 160.)

Our conclusion is that a mortgagee, either in possession or out of possession, is not entitled to purchase the estate at a tax sale, and set up the tax title as against the mortgagor or the other mortgagees. They all have a common interest in the preservation of the estate,

and therefore, if either of them purchases the estate at a tax sale, it should be presumed in favor of the others that he made the purchase for the common protection.¹ //

We think a case is shown which entitles the complainants to relief.

¹*Schenck v. Kelley*, 88 Ind. 444 (1882), accord. Compare *Medley v. Elliott*, 62 Ill. 532 (1872).

62 Ill. Held entgor ed not buy at tax sale that wh
is entgor. @ clear. wd be prevented by
title by satopped rule.

91
score taken to
here

CHAPTER III.

EXTENSION OF MORTGAGE.

omit

VANHOUTEN v. McCARTY.

COURT OF CHANCERY OF NEW JERSEY, 1842.

(4 N. J. Eq. 141.)

Held oral
Cont. to Ex-
tended time
on mtge
is binding
& prevents
foreclosure
till time
up.

THE CHANCELLOR [PENNINGTON]¹. In 1836, during the rage for speculation in real estate, the complainant sold his farm, in the neighborhood of Paterson, to the defendant, John McCarty, for thirteen thousand dollars; the conveyance was made on the twenty-seventh of April, 1836, and, to secure so much of the consideration money, the defendant executed to the complainant a bond and mortgage, in the same day, for ten thousand eight hundred and twenty-two dollars and fifty cents, on the premises, payable in the following manner: one thousand dollars on the twenty-ninth of September, then next; two thousand dollars on the first of May, 1837, and the residue on the first of May, 1838, with interest from the first of May next after the date of the bond, payable on the first days of November and May in each year.

On the same day that McCarty got his deed, he conveyed the property to Kirk, Johnston and Copland, and they, under an agreement made by McCarty with Edward N. Rogers and John A. Stimler for a large advance, conveyed the property to them, by deed dated the twenty-fourth of September, 1836. Since the last deed, Edward N. Rogers and John A. Stimler have conveyed to Archibald G. Rogers, who has also conveyed to Nehemiah Rogers, in whom the equity of redemption now resides.

The bill is filed for the foreclosure and sale of these premises, under the mortgage made by McCarty to the complainant.

A decree *pro confesso* was taken against McCarty and wife, Edward N. Rogers and Stimler. Archibald Rogers and Nehemiah Rogers have filed separate answers, upon which the cause has been put at issue, and depositions taken.

The first ground of defence set up is that the transaction is usurious, and the bond and mortgage therefore void.²

¹ The opinion only is given.

² The discussion of this point is omitted. The learned Chancellor reaches the conclusion that the evidence fails to establish a case of usury.

The next point taken arises from the object the purchasers had in buying this property. They intended to set it off in building lots, and Edward N. Rogers, who had agreed in his purchase with McCarty for five years for the payment of the money, after getting his deed, learned for the first time, from the complainant, that the bond and mortgage were payable at an earlier day; he expressed his surprise, and told the complainant that he should look to McCarty and those concerned with him to make good their agreement; when the complainant told the witness that he did not believe there would be any difficulty, as his great object was to get his interest; that the witness thereupon told complainant he would think over the subject and make him a proposition. The witness then says, that the same afternoon he called on the complainant, and told him he would make this agreement with him—that if he would extend the time of payment of the bond five years from the twenty-seventh of April ensuing its date, making six years in all, and release the lots that deponent and Stimler should sell from the lien of the mortgage (provided such release did not exceed one-fourth of the property) on his being paid for the property thus released, or having the bonds and mortgages given for their purchase money assigned to him, that complainant might retain the possession of the residue of the farm free of rent, and that no claim would be made for rent for the time he had already occupied it. This proposition, he says, was agreed to by the complainant.

agreement.

The evidence then proceeds to show that the complainant is guilty of a breach of this agreement; and it is insisted by the answer that the defendant, Nehemiah Rogers, is entitled, before the complainant can have his decree in this cause, to a specific performance of the complainant's agreement to release lots as they should be sold on the premises, or to have his damages for such breach of his agreement set off against the amount of the bond and mortgage.

As to cont
to release lots
as sold.

This is taking a wide range, and involving in a case of foreclosure of a mortgage a great variety of matters and endless litigation. If this defence should be sustained, I see no limit on a bill of foreclosure to settling before decree every agreement and controversy respecting the land between the complainant and all the intermediate owners down to and including the present, and that, too, whether the mortgage has any connection with them or not. This agreement is not made with the mortgagor, but with Edward N. Rogers, an intermediate owner, and is declared to have been entered into long after the mortgage was made, and for purposes connected with the property growing out of the manner in which sales were proposed to be made. The defendant must, in my opin-

ion, be left on this agreement to his remedy at law. The complainant is able to refund in damages, as it is stated, for any amount in which he may be justly chargeable, and there is no safe mode in this court of settling questions of this character; it is properly a case for a jury to assess the damages, and not for investigation before this court. The evidence would lead me to believe that the complainant has not regarded, as he should have done, the position of men who had purchased property at so expensive a rate, and who had no way of remunerating themselves but by selling off lots; still, I do not see how the defendant can avail himself of such a defence in this action. Can this court decree a specific performance against the complainant of his agreement in this action? There is no precedent for such a course of practice, and to attempt to settle the damages incident to a breach of such an agreement would be equally against the course of procedure. I am, therefore, of opinion, that this defence cannot avail the defendant in this action.

As to extension of time.

The last objection is, that the time of payment for the principal was extended by the complainant for five years from the twenty-seventh of April, 1837, and the bond and mortgage will of course not be due until the twenty-seventh of April, 1842. This is clearly established, from the evidence, and the defendant is entitled to this time before payment can be demanded. Edward N. Rogers expressly so swears, and the whole evidence, as well as the statement in the complainant's bill, go to show such an understanding. It is well settled, that the time for payment may be extended by parol. (Chitty on Contracts, 27, in note; 1 John. Cases, 23; 3 John. 528; 2 Wendell, 587; 14 John. 330; 1 Green, 165; Saxton, 280.)¹

So can only foreclose for interest due.

There must, therefore, be a reference to a master, to ascertain and report the amount due the complainant for interest on the bond and mortgage, after deducting a fair compensation for the use and occupation of the farm; and also, whether a part of the premises can be sold without material injury to the rest. The justice of this case, as far as I am able to reach it in this suit, as it appears to me, is to consider the time of payment for the principal of the bond enlarged to the twenty-seventh of April next, leaving the interest payable half yearly. The contract made for complainant's enjoying the possession free of rent, is part of the one for releasing a portion of the lands, subsequently made with Mr. Rogers, and must be settled with that.

¹Tompkins v. Tompkins, 21 N. J. Eq. 338 (1871),

Whether oral extension good will postpone to next case.

That in general must be consideration for extension is clear. (card). A C.P. considered for a Cent is what is required.

Wholly a ? of fact as to whether was an Estoppel here. Did pt's testator know dept was intending to buy if netge was extended & promise to extend w.o. intending to keep promise & so mislead dept? If not then not real Estoppel. A promise can't create

an Estoppel. But if testator knew whole situation the case is much like Devremon v. Shaw. Promise acted on in way promisor intended. ~~Can't find no other case on this question exactly.~~ Seems O.K. What little authority there is is accord.

VAN SYCKEL v. O'HEARN.

COURT OF CHANCERY OF NEW JERSEY, 1892.

(50 N. J. Eq. 173)

On final hearing on pleadings and proofs.

BIRD, V. C. The complainants in this case filed their bill to foreclose a mortgage which was held by the testator, in his lifetime, on lands in the bill described. The bond which the mortgage was given to secure had been due for many years. The bill was filed on the 25th day of November, 1891. In the month of March, 1891, the then owner of the premises entered into negotiations with Patrick O'Hearn, one of the defendants, for the sale to him of the said premises. O'Hearn was willing to purchase the premises, provided the testator, who was then living, would not require the payment of the mortgage, which he then held, for one year from the 1st of April then next ensuing. Both parties to the said negotiations requested Mr. Wyckoff, a counselor at law and intimately acquainted with the testator, to procure the consent of the testator that the time for payment of his mortgage should be extended for one year from the 1st of April, 1891. He did procure such consent. Thereupon the negotiations for the sale and purchase of the premises were carried through.

There being no doubt as to the amount of money actually due upon the bond which the mortgage was given to secure, the only question is whether the complainants had a right to commence their suit to foreclose said mortgage before the expiration of the one year from the first day of April, 1891. The complainants say that the obligation being in writing and under seal, the time for the performance thereof cannot be enlarged by a parol agreement. I think all of the authorities, in this State at least, hold the time for performance of every such contract may be extended by parol.

(*Bigelow v. Rommelt*, 9 C. E. Gr. 115; *Tompkins v. Tompkins*, 6 C. E. Gr. 338; *Maryott v. Renton*, 6 C. E. Gr. 381; *Cox v. Bennett*, 1 Gr. 165; *Vanhouten v. McCarty*, 3 Gr. Ch. 141; *Stryker v. Vanderbilt*, 1 Dutch. 482; *Bell v. Romaine*, 3 Stew. Eq. 28; *Sharp v. Wyckoff*, 12 Stew. Eq. 376; *Measurall v. Pearce*, 4 Atl. Rep. 678; *King v. Morford*, Sax. 274; *Stoutenburgh v. Tomkins*, 1 Stock. 332; *Baldwin v. Salter*, 8 Paige, 473; *Lattimore v. Harsen*, 14 Johns. 329.)

Again, the complainants say that if the time for performance of a written contract may be extended or enlarged by parol, some consideration must be shown therefor before the court will enforce such parol contract. The proposition thus stated is supported by

Hold, oral
Extension of
time good.
Consideration
really, and
necessary.
But if party
makes promise
on which
other relies
& then seeks
relief in
Eq. he is
estopped
to go back
on promise.
Can't fore-
close if
extension.

the authorities. (*Parker v. Jameson*, 5 Stew. Eq. 222; *French v. Griffin*, 3 C. E. Gr. 279, 281.)

But a court of equity will sometimes prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of such promise. If a party asking the aid of the court waive strict performance of his contract and makes promises to the defendant upon which the latter has acted and altered his position, and it should appear to the court to work a hardship to the defendant to allow the complainant to withdraw his waiver, a court of equity always applies the doctrine of estoppel. In such case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stands in his way; and when this plainly appears, it is most equitable that the court should say that they shall so stand. (*Martin v. Righter*, 2 Stock. 510; *Church v. Florence Iron Works*, 16 Vr. 133; *Phillipsburg Bank v. Fulmer*, 2 Vr. 55; *King v. Morford*, *supra*; *Huffman v. Hummer*, 3 C. E. Gr. 83, 90; *Stryker v. Vanderbilt*, *supra*; *Miller v. Chetwood*, 1 Gr. Ch. 208; *Cox v. Bennett*, 1 Gr. 165; *Lee v. Kirkpatrick*, 1 McCart. 264, 267; *Continental National Bank v. National Bank Com.*, 50 N. Y. 575; *Garrison v. Garrison*, 5 Dutch. 153.)

The bill should be dismissed with costs.

These are
good cts. on
estoppel, not
as to rights.

DODGE v. CRANDALL.

COURT OF APPEALS OF NEW YORK, 1864.

(30 N. Y. 294.)

Holds oral agree-
ment to extend
with 5 yrs. good.

Appeal from a judgment of the Supreme Court.¹

WRIGHT, J. The mortgage sought to be foreclosed by action was, in the winter of 1858-9, held by the administrator of S. V. R. Mallory, deceased. The premises covered by it had, after its execution, and about the 23d February, 1856, been conveyed by the mortgagor to the defendant Holcomb, who assumed the payment of the mortgage as a part of the purchase price of the premises. The mortgagor had paid the interest, and \$266.66 of the principal sum secured by it, before the sale and transfer of the premises to Holcomb. Afterwards Holcomb paid the interest. The whole principal became due and payable on the 1st March, 1858. Shortly

¹ The statement of facts is omitted.

Not within
S. V. R. do
as an ex-
ecuted
agreement.
Not to run
sealed
cont. but to hold
it in abeyance.
Anyhow good to
avoid circuitry
of action.

Oral Extension is good. Truly so held.

As to Statute of Frauds:

(1) Not a Conveyance at all - Simply lease matter in state quo.

(2) Not to be performed within a year. Ans. is that is executed. Can be so argued. Has modified intge. But if so argue then Sec. 11 the rule as to altering a specialty. Cts arg. a little weak. But rule as to altering specialty shd be discarded anyhow. So perhaps fair reason. Other Courts have said (b) not be

using St. as a fraud: not very good reason for repealing St. (c) is executed even so cant put parties in state quo: Some Courts go on this idea in other kinds of cases: but of course can give restitution by quasi-cont. (d) Equity won't help intge. Contrary to his agreement - Sec. 11 & a practical -

(d) fully executed on one side & that suff. Some Cts so hold but is judicial repeal. Practically all cases take it out of St.

As to Varying Sealed:

One case clear as after breach. Anyhow shd be good for injunction but not a good of Circuity - see margin.

before the 28th February, 1859 (the administrator of Mallory being about to foreclose the mortgage), Holcomb entered into an agreement with the plaintiff's testator, whereby the latter agreed to purchase the mortgage of Mallory's administrator, who then held the same, and extend the time of payment five years, or give that additional time from the time he took the assignment, to pay the balance due upon the bond and mortgage; in consideration of which, Holcomb agreed to pay him fifty dollars, which he did pay, and Holberton took the assignment of the mortgage, and continued to hold the same, and receive payments of interest thereon up to his death. The bond and mortgage were assigned to the plaintiff's testator on 28th February, 1859, and the time agreed to be given to Holcomb to make payment would not expire until the 28th February, 1864.

This foreclosure suit was brought in June, 1862, and the question is whether the executor of Holberton is entitled to sustain it, notwithstanding the contract of his testator to purchase the mortgage, and forbear foreclosing it for five years; or, in other words, to extend the time of payment of the debt secured to be paid by it, and which was due, for five years from such purchase. If Holberton, in the face of his contract, was not entitled to maintain an action to collect the principal secured by the mortgage by a foreclosure thereof before the five years elapsed, it is very clear his representative is not.

The ground taken at the trial was that the contract was void by the statute of frauds, not being in writing, and being an agreement that by its terms was not to be performed within one year from the making thereof. (2 R. S. 135, § 2, sub. 1.) I am of the opinion that it was not affected by the statute. The statute applies to executory, and not to executed contracts; and the one in question, I think, was of the latter description. It was certainly executed by Holcomb; and it seems to me the purchase of the mortgage by the plaintiff's testator was an execution on his part. Holberton agreed in substance to purchase the mortgage, and forbear to foreclose it for five years, in consideration of fifty dollars. He did purchase, and take an assignment of it, and Holcomb paid him the fifty dollars. Thus, the contract was fully executed. Nothing further remained to be done by either party. Holberton had simply to wait five years for his money. Holcomb had paid the consideration money, and Holberton had entered upon the contract by receiving the money and purchasing the mortgage, and neither party could rescind it. Neither could Holcomb recover back the money, nor Holberton refuse to carry out the contract, based as it was upon a good consideration, and which he had undertaken to execute.

as to St. Feb.

?

*As to Varying
Sealed in Stru-
ment.*

The further point is now urged (although not alluded to on the trial), that the mortgage being a specialty, no agreement in regard to it could be valid unless the agreement was also a specialty. It may be conceded that ordinarily a sealed executory contract can not be rescinded or modified by a parol executory contract; but that was not this case. Here the mortgage was due. The holder was about to enforce it by action; whereupon Holberton agrees, for a valuable consideration, to purchase and refrain from collecting it for five years. This agreement is executed by the purchase; and as respected the plaintiff's testator, operated as effectually to extend the time of payment as if it had been under seal. Indeed, as title to the mortgage would pass by mere delivery without a written assignment, I cannot see why an agreement to extend the time of payment, if founded upon a good consideration, would not be valid and effectual for that purpose, even if executory, and not reduced to writing. The agreement, in this case, was not one varying the terms of the sealed contract so as to require it to be under seal, but rather an agreement, based upon a good and valid consideration, to hold such contract in abeyance until the expiration of the time fixed upon by the new contract. It was conceded upon the trial that Holcomb was in a proper position to set up the new contract, provided such an one was made.

O.K. as reason.

*Arg. is that what
Eis will assign
shd be founded
to extend. But
deliv. is more
formal than con-
oral agreement.*

What arg.

*No real circuit
as damages not
same. But
remedy at law
is adequate b/c
Eq. may well
enjoin the
foreclosure.*

But, in any event, as suggested by the learned judge delivering the opinion in the Supreme Court, the judgment is sustainable upon the equitable ground that the defendant, having a cause of action, would be allowed to set it up to prevent circuitry of action. Holberton having taken the assignment, and held it under the contract as proved, and received a consideration therefor from the defendant, and this action being by his representative, it is the same as if he were seeking to foreclose the mortgage by suit, notwithstanding his agreement. If the defendant could have no defense to the foreclosure, still his agreement with Holberton would give him a right of action for the injury he received; otherwise he would be remediless. In the face of his agreement, Holberton, or his representative, ought not to be allowed to foreclose the mortgage, and on the principle of avoiding circuitry of action, the law will give effect to such agreement as a defense to the foreclosure suit.

*After much
sealed cut
way b/c
varied by
parol. Cont was
executed b/c St
frds has no ap-
plication.*

The judgment of the Supreme Court should be affirmed. JOHNSON, J. The agreement between the defendant Holcomb and the plaintiff's testator was that the former should pay to the latter fifty dollars, and that the latter in consideration thereof should purchase the bond and mortgage in question, and extend the

day of payment of the principal for the period of five years from the time of the making of said agreement. Holcomb thereupon paid the money, and the testator purchased and took an assignment of the bond and mortgage. The mortgage debt was then wholly due, and the testator's assignor was about proceeding to foreclose the mortgage. The principal if not the only question in the case is whether this, being by parol, was a valid agreement, and operated to extend the time of payment of the indebtedness. If it was, and such was its effect, the action was prematurely brought, and the decision of the Supreme Court was right, whether the proper reason for the judgment was assigned or not.

That the time of the payment of a simple contract debt may be thus extended, so that no action will lie for its recovery until the expiration of the extended time, when the agreement to extend is founded on a good consideration, is too well settled to admit of question. Under the former system of practice, such an agreement, to defeat the action, could be proved under the general issue, as it went to show that nothing was due, and there was no cause of action when the suit was commenced. (1 Chit. Pl. 512.) And so, I suppose, under the present system the same evidence may be given under a general denial, as it goes to controvert what the plaintiff is bound to establish by his evidence, to wit: the existence of a demand due at the commencement of the action. In such a case the subsequent agreement operates upon the instrument, where the demand is evidenced by writing, and becomes part of it, so that the obligation, instead of becoming due according to its terms, is only due at the expiration of the extended time, and until that happens, no action can be maintained upon the instrument. The subsequent agreement does not operate to destroy the original agreement, but only to modify it in respect to the time of payment.

It is claimed, however, on the part of the plaintiff, that this principle has no application to instruments under seal, and that in regard to instruments of that character, it requires an agreement in writing of equal solemnity to effect a change or modification in any material particular. This seems to be the rule in such cases, before any breach of the specialty, and where the subsequent agreement is executory merely. It was so held in *Allen v. Jaquish*, 21 Wend. 628, and in *Eddy v. Graves*, 23 id. 84, cited in the opinion of the court in this case at general term.

But it is, I think, equally well settled that after the breach of a sealed agreement it may be modified in any respect, or wholly rescinded, by an executed parol agreement founded upon a sufficient consideration. (*Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Fleming v. Gilbert*, 3 Johns. 528; *Keating v.*

E in Pl.

Contract.

As to varying sealed.

O.K.

Price, 1 Johns. Cas. 22; *Delacroix v. Bulkley*, 13 Wend. 71; *Townsend v. Empire Stone-dressing Co.*, 6 Duer, 208.) Many other cases might be cited to the same effect, but the rule seems to be too well settled to require it.

As to St. Frds.

That this was an executed and not a mere executory contract between the parties is extremely clear. The defendant's proposition was to pay \$50, in consideration that the plaintiff's testator would buy the bond and mortgage and extend the time of payment. This proposition was accepted by the testator who received the money and made the purchase. Nothing else was to be done. The agreement did not contemplate the doing of any further or other act to effect the extension. The extension was effected completely and perfectly in law the moment the agreement was consummated by the payment of the consideration on one side and the purchase of the securities on the other. The agreement was then completely executed, and took effect upon the bond and mortgage which, in the hands of the assignee, became due and payable as against the defendant Holcomb in five years, and not before. After that it was in no conceivable sense an executory agreement. Its entire object and purpose had been completely and perfectly fulfilled. It is upon this principle only that the proof of an agreement to extend the time defeats the action brought before the expiration of the extended time. The defense in such case does not proceed upon the ground of recoupment of damages for a breach of the agreement to extend, but upon the ground that the agreement, by its own force, operates upon the original contract, and effects the extension by way of a modification of the contract. The statute of frauds has, clearly, nothing to do with the case.

The judgment should, therefore, be affirmed.

All the judges were for affirmance, except SELDEN, J., who thought the agreement void under the statute of frauds, as not to be performed within a year.

Judgment affirmed.



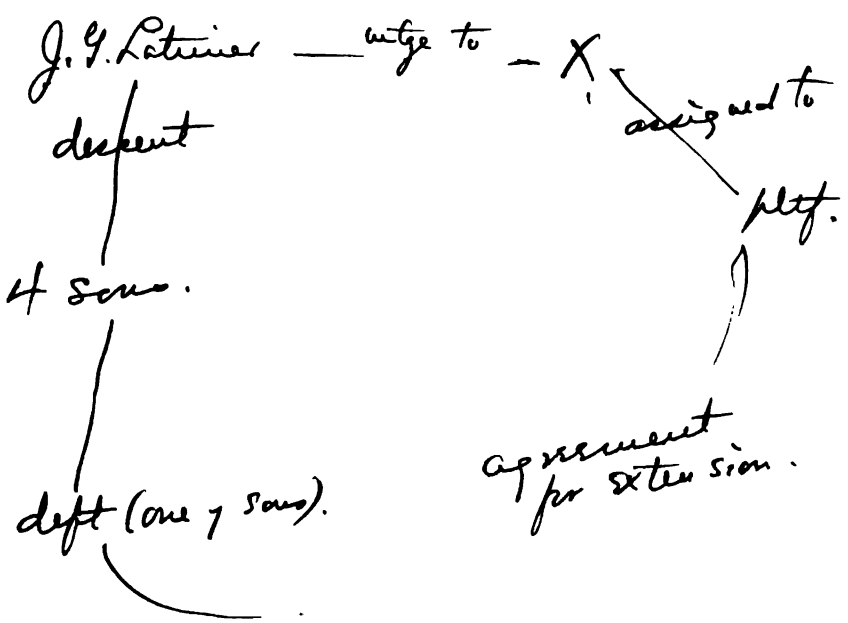
OLMSTEAD v. LATIMER.

COURT OF APPEALS OF NEW YORK, 1899.

(158 N. Y. 313.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 9,

there must be a consid. for an agreement to extend a mortgage. Selden was dissatisfied not to pay for so long. he gave up his right to pay



1896, modifying and, as modified, affirming a judgment entered upon a decision of the court on trial at Special Term.

In August, 1878, one John G. Latimer executed his bond with a mortgage on a lot and building on Atlantic street, Brooklyn, to secure the sum of \$18,000 borrowed by him. The plaintiff subsequently acquired that bond and mortgage. In 1884 Latimer died intestate, seised of the mortgaged premises, leaving a widow and four brothers (the three defendants and one James D. Latimer), his only heirs at law. Letters of administration were issued on the estate of John G. Latimer, and upon settlement of the estate it appeared that the personal estate was exhausted by the payment of the debts and expenses of administration, leaving a deficiency in the amount due for administrator's fees. The deceased left real estate of considerable value, all of which was, prior to the commencement of this action, sold by the three defendants Latimer, as heirs at law, for the aggregate sum of \$57,500, the value of the widow's dower in which was estimated at \$8,426, leaving the net value of the lands sold in the hands of each of the defendants at the time of the trial at \$12,268.50, outside of the mortgaged premises. The latter were conveyed, during the years 1888 and 1889, to Frederick B. Latimer by bargain and sale deeds, each reciting the consideration of one dollar. After Frederick had acquired all the interest of his brothers in the mortgaged premises, he and the plaintiff executed the following agreement [October 15, 1891]:

"We agree that the time for the payment of the Bond and Mortgage for \$18,000 on 201 and 203 Atlantic Avenue, Brooklyn, made by John G. Latimer to the executors of Noah T. Pike and recorded in the Register's office of Kings County in Liber 1425 of Mortgages, page 17, August 24, 1878, being the date thereof, shall be and hereby is extended to May 1, 1895, subject to the same terms and conditions, including tax, insurance and interest clauses, as at present."

In April, 1892, a fire occurred in the buildings on the mortgaged premises, by which they were partially injured. In an attempt to restore the buildings they collapsed and became a total loss. By this accident the value of the mortgaged premises fell below the amount of the mortgage. Thereafter, the plaintiff instituted this action to foreclose the mortgage and hold the defendants, as heirs at law of the original bondsman and mortgagor, liable for any deficiency. The trial court held the defendant Frederick liable for $\frac{1}{4}$ of any deficiency, and the other defendants not liable. From this decree the plaintiff and the defendant Frederick appealed to the Appellate Division, the former seeking to hold all the defendants, the latter to be relieved from liability. The court modified the

judgment by increasing the liability of the defendant Frederick to one-quarter of any deficiency that may arise on the foreclosure sale, and in all other respects affirmed the judgment.

PARKER, Ch. J. The defendants Latimer, as heirs at law of the mortgagor, were respectively liable under section 1843 of the Code for the debts of the said mortgagor decedent to the extent of their interest in the real property that descended to them from him. The premises covered by the mortgage were primarily liable to pay the mortgage debt. As there was no personal estate the defendants were secondarily liable, and they were properly made parties in the action of foreclosure by virtue of section 1627 of the Code, which provides that "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him" of any deficiency. The judgment as it comes to us decrees that the defendant Frederick B. Latimer shall pay one-quarter of the deficiency, but it has been held that the effect of the conveyance of the premises to the defendant Frederick by his brothers in the years 1888 and 1889, together with the fact that he informed the plaintiff of such conveyance, and thereafter made an agreement to extend the time of payment of the bond and mortgage, had the legal effect of making Frederick the principal debtor and his brothers sureties, and hence that the effect of the agreement, extending the time of payment, operated to release the sureties from all liability to the plaintiff on account of the indebtedness evidenced by the bond. Assuming, but not deciding, that the effect of the conveyance, and that which subsequently happened, was to change the obligation of the defendants other than Frederick towards the plaintiff, from that of principals to that of sureties, we come to the question whether the agreement to extend the time of payment was invalid for want of consideration.

There are several decisions in this court in which the question has been considered, and they are in harmony with one another. In *Kellogg v. Olmsted*, 25 N. Y. 189, the action was on a promissory note by the transferee of the payee. The answer alleged that after the note became due it was mutually agreed between the holder thereof, the payee, and the defendants, "that in consideration that the defendants would keep the principal sum of the said note until the first day of April, 1857, and pay the same with interest on that day, he, the said payee, would extend the time of payment of the principal of said note until the first day of April, 1857; that the said defendants then and there assented to such proposition, and then and there agreed to and with said Covil to keep said principal sum

use in cont.
+ Surety ship

of said note until the first day of April, 1857, and to pay the same with interest on that day." On the trial of the action the referee excluded evidence offered by the defendants to establish the defense so specially set up, and exceptions were taken thereto that presented the question to this court. It was held that an agreement by a creditor to postpone payment of a debt until a future day certain, without other or further consideration than the agreement of the debtor to pay the debt with interest, is void for want of consideration; the court citing, in support of its position, *Miller v. Holbrook*, 1 Wend. 317; *Gibson v. Renne*, 19 Wend. 390; *Pabodie v. King*, 12 John. 426; *Reynolds v. Ward*, 5 Wend. 501; *Fulton v. Matthews*, 15 John. 433.

Use in Court

A dissenting opinion was written by Judge Davies, who two or three years later wrote the principal opinion in *Halliday v. Hart*, 30 N. Y. 474. In that case the action was brought to recover against the maker and two indorsers on a promissory note. The indorsers defended on the ground that the plaintiff had, for a valuable consideration, and in writing, extended the time of payment for a period of some months, and claimed that the effect of such extension was to discharge the sureties from liability. The authorities bearing upon the question were very carefully considered, and the court decided that a partial payment by the maker on account of an overdue note is not a valid consideration for a promise of forbearance as to the residue so as to discharge the indorsers. A concurring opinion was written by Judge Hogeboom, in which he says: "The sureties were not discharged. There was no valid agreement for the extension of the time of payment. There was no payment of any sum which the party paying was not obliged to pay. The performance of an unqualified legal obligation by payment of part of a sum due upon a note is not a valid consideration for the extension of payment of the remainder."

The next case in this court was *Lowman v. Yates*, 37 N. Y. 601. The action was upon a bond given by Ely, as principal, with Parmenter, as surety, conditioned that Ely should, before a given date, take up and deliver to the plaintiff two mortgages executed by him, amounting to ten thousand dollars. The action was brought against the personal representatives of the surety, the principal having died. The defense relied upon was that the plaintiff, without the surety's consent, took from the principal four negotiable promissory notes, to be applied upon the bond for the payment in the aggregate of about seven thousand dollars of principal, three, three and one-half, four and five years after date, and indorsed the same upon the bond, thereby extending the time of payment and discharging the defendant as surety. The court, recognizing the

principle that a creditor by a valid and binding agreement between himself and the principal debtor, extending the time of payment without the consent of the surety, thereby discharges the latter from liability, said that in order that an agreement shall accomplish that result it must have a sufficient consideration, so as to prevent the prosecution of the debt by the owner, and to prevent the surety from compelling him to enforce it. It was claimed by the plaintiff that he was induced to enter into the agreement, and take notes extending the time of payment, by the fraudulent representations made by the principal debtor, and it was held that the court properly left it to the jury to determine whether the notes were imposed on the plaintiff by fraud, and if so that their receipt by the plaintiff under the agreement did not operate to extend the time of payment of so much of the amount of the bond as their face value represented. It was also held that the judge properly charged that in any event the extension of the time of payment did not discharge the surety as to the residue of the bond beyond the amount of the notes. In *Parmelee v. Thompson*, 45 N. Y. 58, one of the makers of a promissory note after maturity paid to the payee a sum equal to the amount due thereon and took possession of the note. Subsequently he brought suit against another maker, who gave evidence tending to show that while the payee held the note an action was brought thereon in the Supreme Court, and that it was agreed between the defendants and the plaintiff therein that the suit should be discontinued, the defendant to pay the costs and have until the ensuing December to pay the note; that the costs were paid and the suit discontinued, after which the plaintiff became the owner of the note and brought the action before the expiration of the time agreed upon, and the trial judge held that there was no valid agreement to extend the time of payment. The judgment was affirmed in this court, the opinion being written by Judge Allen, in which he said: "It is competent for the parties, by a parol agreement, to enlarge the time of performance of a simple contract. . . . But a promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or a promise to pay interest for the future, is not a sufficient consideration to support such promise." (Citing *Miller v. Holbrook*, *Gibson v. Renne* and *Kellogg v. Olmsted*, *supra*.)

In *Powers v. Silberstein*, 108 N. Y. 169, the action was brought upon a promissory note made by the firm of Joy & Bowman and indorsed by the defendant Silberstein, who alone answered, setting up as a defense that the note was indorsed by him for the accommodation of the makers, and that the time of payment was extended

Use in Surety
ship.

by an agreement, made without his consent, between the makers and the plaintiff. The plaintiff had judgment in the trial court, which was affirmed at the General Term, but reversed in this court on the ground that there was evidence tending to establish that the plaintiff, after the maturity of the note, agreed with the makers, Joy & Bowman, to forbear the collection of it if they would continue plaintiff's son in their employment, and that Joy & Bowman consented and did retain him in their service upon this consideration. In the course of the opinion the court cited *Lowman v. Yates, supra*, upon the proposition that a mere indulgence by a creditor of the principal debtor will not discharge the surety, and that the agreement for an extension, made without the consent of the surety, must be upon a valid consideration, such as will preclude the creditor from enforcing the debt against the principal, but argued that the plaintiff did not deny that the employment of his son was an inducement to the original loan, or that the subject of his continuing employment was referred to in his conversation with the makers of the note after maturity, and that, taken in consideration with the fact that the loan was allowed to remain standing for three years after the maturity of the note, presented a question for the jury as to whether there was an extension of the time upon a good consideration.

Our attention has not been called to any authority in this court in hostility to the position taken in the decisions we have referred to. The rule laid down by them has been followed in many cases in the trial courts, and among them may be found the comparatively recent cases of *Manchester v. Van Brunt*, 19 N. Y. Supp. 685, and *Babcock v. Kuntzsch*, 85 Hun, 615. The reasons assigned by the learned justice who wrote for the Appellate Division, in favor of overthrowing the doctrine of these cases, while presented with marked ability and clearness, are not at all new. They were advanced in the dissenting opinion by Judge Davies in *Kellogg v. Olmsted, supra*, the first case in which the question received attention in this court, so far as we are advised. Whether the reasoning of the prevailing or dissenting opinion seems the better, it is not profitable to inquire, for the question was settled by the decision of this court, and has by later adjudications become so firmly grounded that it may not now be questioned.

The judgment should be reversed as to the defendants Henry A. and Brainard G. Latimer, and that of the Special Term modified by striking out the direction to the referee to pay costs to Brainard G. and Henry A. Latimer, and so further modified as to adjudge that the defendants, Frederick B. Latimer, Henry A. Latimer and Brainard G. Latimer, each pay to the plaintiff one-quarter of any

deficiency that may arise on the sale of the mortgaged premises under said judgment, and as thus modified affirmed, with costs.

All concur.

suit
LOOMIS v. DONOVAN.

SUPREME COURT OF JUDICATURE OF INDIANA, 1861.

(17 Ind. 198.)

Appeal from the Cass Common Pleas.

PERKINS, J. Suit to foreclose a mortgage, which was the sole written evidence of the debt, no note or bond having accompanied the mortgage. The suit is against W. A. Parry and C. C. Loomis. The mortgage was given by Parry to Donovan. After it became due, Donovan agreed by parol with Parry and Loomis, all three being together, that if Parry would sell, and Loomis would purchase Parry's equity of redemption in the mortgaged premises, assume Parry's mortgage debt, and pay \$50 down upon it, he would extend the time of payment of the balance, and the foreclosure, until July 1, 1861. The agreement was concluded between the three. Loomis made the purchase of the equity of redemption, assumed Parry's mortgage debt, and paid \$50 upon it.

Donovan did not delay the foreclosure suit till July 1, 1861, and Loomis, one of the defendants, sets up the foregoing facts in answer to the action. The court below held them no bar, and gave judgment of foreclosure and sale. Was the ruling of the court right? This is the only question.

The point is this. A creditor who holds a sealed obligation for the debt, past due, agrees with the debtor, by parol, for a valuable consideration, viz., that he procure a third person to perform an act, that he will extend the time of payment; and he agrees, in like manner, with such third person, that, if he will do the proposed act, time shall be given on the debt, as to him. Here, then, is an agreement by parol, with an existing and, substantially, a new debtor, for a consideration which is executed, at least in part, to give time, as against both of them, on an existing bond debt, till a given day, and the question is, will a court of equity give effect to it? It does not involve the question of discharging sureties; but of how far the debtor and a new surety can have the benefit of an agreement for time. (See, as to giving time where sureties are concerned, *Halstead*.

*Holds Cent.
to give time
present for
closure &c.
Eg will
not aid
one is
good faith
it was
that ed.
not vary
Sealed
instru-
ment by
parol.*



v. *Brown*, *post*, p. 202; and where they are not, *Mendenhall v. Lenwell*, 5 Blackf. 125.)

It is settled law that giving time to the principal by a binding contract, though made after breach, discharges the surety. Why? Because it is said that the surety has two rights under the contract as originally made, at common law, viz., to pay off the debt as soon as it becomes due, or at any time afterward, and then immediately sue the principal to recover back his money; or, to apply to chancery for the collection of the debt by the creditor, in which suit the creditor and principal debtor are brought before the court immediately; and that a valid contract by the creditor, extending the time of payment to the principal, ties up the hands of the former, so that he can not enforce payment of the contract when thus brought into chancery, and that the surety can not enforce it, and, hence, is injured by the act of giving time. (Leading Cases in Equity, Vol. 2, Part 2, p. 362, side p. 716.) It is evident that equity will not enforce a contract upon which time has been validly given, till the extended time has elapsed. And this doctrine of discharging sureties because of the extension of time to the principal, in a contract which forbids its enforcement within such time, was of chancery origin (*Dickerson v. The Board, &c.*, 6 Ind. 128), and belonged intrinsically to equity. (1 Eden on Injunctions, 3d ed., p. 65.) And it made no difference that time was given by parol upon a contract under seal. (Leading Cases in Equity, Vol. 2, Part 2, top p. 369; Burge on Suretyship, p. 212.) Later, the doctrine was applied at law to the extent of releasing the sureties, but not to the extent of suspending the action at law against the principal, where the new contract was made after breach of the original. (*Dickerson v. The Board, &c.*, *supra*. But see *McComb v. Kittridge*, 14 O. Rep. 348. And see *Rigsbee v. Bowler*, ante, p. 167.) Perhaps equity would grant an injunction to restrain the action at law against the principal till the extended time had elapsed. (Burge on Suretyship, p. 206.) "This doctrine (says the Supreme Court of Vermont), which is derived from chancery, is founded on the obligation which the contract for delay imposes upon the conscience of the creditor to perform it." (*Austin v. Dorwin*, 21 Vermont, 38.) And such are the contracts which chancery was originally created to enforce; but chancery will never lend its aid to enforce a contract "in opposition to conscience or good faith." (*Creath's Adm'r v. Sims*, 5 How. (U. S.) Rep. 192.) It would be in opposition to conscience and good faith to enforce a contract in opposition to an agreement, for a valuable consideration, to give an extension of time.

A suit to foreclose is an appeal to the equity powers of the court. The present is a chancery suit. It is brought in bad faith, in fraud of the rights of Loomis. The plaintiff does not come into court with clean hands. He has not done equity. His suit, upon the defense set up being established, should be dismissed without prejudice.

It is a general proposition of law, that parol evidence may be given to rebut an equity. (See *Page v. Lashley*, 15 Ind. 152.) Browne, in his valuable work on the Statute of Frauds, says: "And while it is not accurate to say that the verbal agreement will be always admitted as a defense in those courts (equity courts), since that would be to relieve them from the binding power of the statute, it seems to be clear that they will not lend their aid to enforce and perfect a legal right which the plaintiff sets up against his conscientious duty, under a verbal contract interposed on the part of the defense." (P. 133.)

Per Curiam.—The judgment is reversed, with costs.¹

MILLS v. TODD.

SUPREME COURT OF JUDICATURE OF INDIANA, 1882.

(83 Ind. 25.)

From the Ripley Circuit Court.

BICKNELL, C. C. The appellees brought this suit against the appellants to foreclose a mortgage, claiming that the writing sued on, although in form an absolute deed from the appellants to the appellees, was intended to secure \$1,400, the purchase-money of certain land, and \$400 for another debt.

The land had formerly belonged to Robert Mills, deceased, who was the husband of the appellant Mary Mills, Sr., and the father of the appellants Joseph Mills and William Mills; it had been sold to one Wheeler, upon a judgment against Robert Mills, and the appellants were seeking to repurchase it for \$1,400; they agreed with the appellees that if the latter would advance the \$1,400, they should have a mortgage on the land to secure the same, and also to secure said \$400, payable in two years, with interest at nine and a half per cent. Under this agreement the appellees advanced the

¹*Trayser v. Trustees of Indiana Asbury University*, 39 Ind. 556 (1872), accord.

*Holds consid. neces.
Dictum (?) that agree-
ment to extend
was bad by St. Frds
Since Extension was
more than a
year.
Dictum (?) that a
valid Crd. to extend
time can't
be pleaded
in bar of
foreclosure.*

Seems three reasons given for decision.

(1) No consid. Up in cont. Clearly wrong if mtg^r agreed to keep money 2 years longer at 6% int.

*But Court refuse redemption
a thing can be done until
foreclosure.*
(2) St. Frds. Already discussed. Over-ruled by later Ind. cases on card. No notice of this case in them at all. Even if mtg^r were refused redemption on grd of St. Frds. still Ct cd well say that mtg^r seeking equity - can't fore-
close contrary to his agreement.

(3) Cont. to extend time anyhow only grd of a Cross action. Might Contra. as to this case & seems clearly shd be. Result of old trouble about action sus-
pended is gone - so held not suspen-
ded. Shd be all discarded. But can get inj. in equity as spe. perf. of the agreement to extend time & in Ind. this cd be put in as an Equit. de-
fense. Also when proceeding is for foreclosure is equitable & so is per-
fectly appropriate defense. Besides
Eq. shd refuse aid anyhow contrary
to p^{ty}'s fair agreement.

Extension of mtg^r does not alter the
priority of the mtg^r or affect lien in
any way. Cards.

\$1,500; it was paid to Wheeler; he conveyed the land to the appellants on March 30th, 1877; and they conveyed it to the appellees by an absolute deed, dated June 18th, 1877. There was evidence tending to show that, by the agreement, the appellees were to execute a bond to the appellants for a reconveyance of the land on the repayment of \$1,800 and interest, in two months from the date of the bond, but there was no proof of the execution of the bond, and, on the 2d of August, 1879, more than two years after the date of the deed, the principal and all the interest being unpaid, this suit was commenced.

The issues joined were tried by the Court, who found for the appellees, that they were entitled to foreclosure for \$2,052; the appellants' motion for a new trial was overruled; judgment was rendered upon the finding, and this appeal was taken.

Several errors were assigned, but only one is discussed in the appellants' brief; the others are therefore waived.

The error relied on in the brief is, sustaining the appellees' demurrer to the second paragraph of the appellants' answer.

That answer is pleaded to the entire complaint. The first paragraph of the complaint avers that the deed was executed to secure the payment of \$1,800, of which \$1,400 was the purchase-money of said land, paid by plaintiffs, and that there is now due and unpaid, of said indebtedness, the sum of \$2,200.

The second paragraph of the complaint states that Wheeler owned the land, which appellants desired to buy for \$1,400, and that plaintiffs held a judgment against the estate of said Robert Mills for \$500, and that the appellants agreed that if the appellees would lend them \$1,400 for the purchase of said land, they would mortgage the same to the appellees, to secure said \$1,400, and also \$400 of said judgment, and ten per cent. interest for two years and until paid, and that the appellees accordingly advanced to appellants said \$1,400, which they paid to said Wheeler, and took from him a deed for said land, and then, on June 18th, 1877, executed to appellees the instrument sued on, to secure the payment of the aforesaid sum of money. The averment in each of these paragraphs is substantially that the deed was intended as a mortgage to secure \$1,800 and the interest, in all \$2,200, and that, although two years had elapsed before suit brought, yet the entire principal and interest remains unpaid.

These matters were fully put in issue by the first paragraph of the appellants' answer, which was the general denial.

The second paragraph of the answer states that the deed was not executed to secure the money and ten per cent., but to secure the consideration therein expressed, and six per cent., which six per

cent. was paid before suit brought, and that, on April 1st, 1879, the appellees agreed that if appellants would pay to them six per cent. interest yearly on said \$1,800 they would extend the time of payment two years from April 1st, 1879, and that appellants, in consideration of such extension of time, faithfully undertook and promised to pay the appellees said six per cent. yearly, which they are ready to do as the same shall mature. Wherefore the defendants say the money secured by said conveyance is not yet due.

So far as this plea alleges that the interest was to be six per cent., and that no interest was due at the commencement of this suit, it is embraced in the general denial already pleaded. So far as it states an agreement in April, 1879, to extend the time of payment two years further, in consideration of the appellants' undertaking to pay six per cent. interest yearly, it amounts to nothing; this undertaking is not averred to have been in writing and was not to be performed within a year, and there was no consideration for it; the money, already past due, bore six per cent. interest, without any agreement. In substance, the plea states an agreement not to sue for a limited time, and states no consideration therefor; but such an agreement, even if founded on a sufficient consideration, can not be pleaded in bar of an action within the time. (*Irons v. Woodfill*, 32 Ind. 40; *Mendenhall v. Lenwell*, 5 Blackf. 125; 33 Am. Dec. 458; *Berry v. Bates*, 2 Blackf. 118; *Newkirk v. Neild*, 19 Ind. 194.) The Court, therefore, committed no error in sustaining the demurrer to the second paragraph of the appellants' answer. Its judgment should be affirmed.¹

Per Curiam.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

¹ *Ayers v. Hamilton*, 131 Ind. 98 (1891), accord. Contra, that a valid agreement to extend the time of payment enlarges the period of redemption and suspends the right of foreclosure: Schoonhoven v. Pratt, 25 Ill. 379 (1861); *Union Central Life Ins. Co. v. Bonnell*, 35 Oh. St. 365 (1880); *Goodall v. Boardman*, 53 Vt. 92 (1880). And see *Seymour v. Bailey*, 66 Ill. 288, 306 (1872), and *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123 (1867).

L.R. 3 Q.B. writ on construction of "default" + so writ accordingly.

See in cont.

Take 634 first
+ then others in
order.

CHAPTER IV.

ASSIGNMENT OF MORTGAGE.

SECTION I. MODE OF TRANSFER.

suit

LAWRENCE v. Knap & Menzey.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1791.

(1 Root, 248.)

Petition in chancery, shewing that Lownsbury was indebted to Plat, for which he gave his note and a mortgage as collateral security, which deed was recorded. Plat was indebted to Hunter, and for a valuable consideration assigned said note to him [and] at the same time delivered him said mortgage-deed. Hunter assigned said note to the petitioner for a debt which he owed him, and also delivered to him said mortgage.

The petitionees attached the mortgaged lands and had them set off to them on executions, as Plat's estate, in satisfaction of debts due from Plat to them. The petitioner had recovered judgment in ejectment for said lands in Plat's name and had taken possession, and now prays that the petitionees may be compelled to release to him their right and title to said premises, or that he be in some way quieted in his right to said lands.

This cause was twice argued. The court now granted the petition and passed a decree against Menzey (Knap having deceased pending the suit) for him to release all his right to said mortgaged premises, upon the principle that the petitioner owned the debt for which said mortgage was given as collateral security—that he who is entitled to the debt, which is the principal thing, hath right to all the collateral securities given to ensure the payment of the debt; especially as in this case, where the actual delivery of the mortgage accompanied the assignment of the note, of which the petitionees had notice.

Afterwards a petition was brought against the heir of Knap and a similar decree passed against them, notwithstanding they had purchased the equity of redemption of Lownsbury, which might entitle them to redeem, but was no bar to the petition.¹

¹Austin v. Burbank, 2 Day, 474 (1807).

GREEN v. HART.

COURT OF ERRORS OF NEW YORK, 1806.

(1 Johns. 580.)

Aylmar Johnson, on the 2d September, 1796, being justly indebted to William Green in the sum of \$1,551.64, gave him a promissory note for that sum, payable to him, or his order, at the Bank of New York on the 1st of May, 1798. To secure the payment of this note, Jonas Platt, who was a trustee of Johnson, executed a mortgage of two lots of land in Corley's Manor, which was duly registered.

In October, 1796, Green endorsed the note to the respondent, and delivered it to him, with the mortgage, which he holds. The respondent filed his bill against the appellant and others, stating the above facts, and that he paid a valuable consideration for the note and mortgage, and that, by non-payment of the money, he was seised of the mortgaged premises; requiring an answer to every part of the bill, and praying that the money might be paid, or the premises sold in the usual manner.

The respondent, on the 3d of March, 1798, gave a receipt to Green acknowledging that he received the note of Johnson as collateral security for the payment of Green's note to him for \$1,491.11, payable the 3d of May, 1798, and stating that the note of Johnson was secured by a mortgage which was "not assigned."

Johnson, in his answer, insisted that the mortgage had not been assigned by Green, who stated that the sum really lent to him by the respondent was only \$1,035; the residue of the note being for usurious interest. There was no satisfactory evidence of the usury; and the chancellor decreed a sale of the mortgaged premises, and an account to be taken of what was due on Johnson's note, and directed the proceeds to be applied to the payment of what was due and the costs. From this decree Green appealed to this court.

The reasons for the decree were assigned by

THE CHANCELLOR¹:

As to the second point, whether the respondent acquired any right to the mortgage in question by the transfer of the note:

The note given to the appellant by Aylmar Johnson was coeval, and part of the same transaction, with the mortgage in question, and the only reason why the agency of Jonas Platt was at all connected with it appeared to have been because he held the mortgaged lands, which were intended as collateral security for the payment

¹A portion of the opinion, relating to the question of usury, is omitted.

Johnson (Johnson) gave note & mtge to Green. Green endorsed note & deliv. mtge (unassigned) to ptey (respondent). Ptey files bill vs Green & Johnson for fore-

A claim of usury on ptey's part was unproved.

Mtge assign. En-

deced note &

deliv. mtge to

ptey as collateral security.

Receipt of ptey

said mtge not assigned.

? whether

ptey has

it on the

mtge.

Held has

mtge in Eq.

follows note.

Statement

that mtge not

assigned. Sim-

ply held it

physical

chd. Was not

agreement

that ptey

did not have

receipt of it.

Note & mtge

are one &

a transfer

of note with

delivery of

mtge trans-

fers the

mtge.

*Opinion to which
appeal taken*

(1) Clearly O.K. Note is principal thing & mortgage
incident. Can do nothing but secure note.
If mortgage retains legal title to mortgage he holds
it in trust for owner of note. True in
both title & lien states. In lien states legal
title to lien ed he transferred easily
that is all.

(2) Could mortgage retain keep. int in mortgage by the
most express agreement. Cd. find no case
where he did & held O.K. Dicta as in our
case that he can. What wd it secure?
If note not endorsed w.o. recourse might
secure his rt to sue mortgagor on it w/o
assignee came back on him. That ^{place} ~~much~~
of mortgage debt he still owns.

(3) See card for other pts.

of the debt due from Johnson, as his trustee. Johnson, therefore, in every equitable point of view, was both the maker of the note and mortgagor, as the mortgage was executed, by his direction or procurement, by his trustee, who has disclaimed all other interest than such as he holds as trustee, and respecting whose interest the parties do not differ.

The endorsement of the note by the appellant to the respondent was accompanied by the delivery of the mortgage. If the note was satisfied, it involved the satisfaction of the mortgage, for the existence of the mortgage, by express reference, depended upon that of the note. In its essence, and by act and operation of law, it was parcel of the same contract, executed at the same time, directed to the same object, and to be satisfied by the same means. up later.

The doctrine laid down by Lord Mansfield in the case of *Martin, ex dem. Weston v. Mowlin*, 2 Burr. 969, which was cited in argument before me, applies to this point with much force. The question in that case arose on a bill between the representatives of the real and the representatives of the personal estate of the testator. In defining the species of property of a mortgagor, Lord Mansfield observed: "A mortgage is a charge upon the land, and whatever will give the money will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts: it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were only forgiven by parol; for the right of the land would follow, notwithstanding the statute of frauds." gee
not s. 4, aut.

quoted affirmingly The receipt of Ephraim Hart designates the mortgage as delivered, but not assigned. This, it appears to me, was merely descriptive of its situation at the time of its delivery. It had no formal assignment; but if it was intended not to be assigned, its delivery to the respondent is inexplicable, unless the slight ligament connecting the note with the mortgage is the reason, as alleged by the appellant. But that circumstance would appear to intimate that the parties intended they should remain inseparable.

I think, however, that the transfer of the note, and the delivery of the mortgage, are decisive on this point, and that the respondent took the latter as a legal incident of the transfer of the debt. |||

SPENCER, J., delivered the unanimous opinion of the court.

On the argument it has been insisted by the appellant's counsel,

¹See Judge Trowbridge's elaborate argument, controverting Lord Mansfield's view, in 8 Mass. 551 (1812), given in part, *supra* p. 21.

Eq. Consider
a wife as
incurred
of debt or
so it passed.
Whether the
wife would
hold it in
trust for
Hart, from
parties
agree that
note should be
transferred
to wife
but no such
intent shown.

1st. That the respondent having, in his bill of complaint, interrogated the appellant as to the consideration for the note and mortgage, his answer, in relation to the usury, becomes evidence in the cause, and is not disproved.

2d. That it was not Green's intention to transfer the mortgage to Hart; and had it been so, nothing passed by the mere delivery, as the statute to prevent frauds and perjuries requires a deed or note in writing.

3d. That the decree is erroneous in directing the whole amount of Johnson's note and mortgage to be paid to Hart, inasmuch as it was a security to him for \$1,491.11 only, the difference between which and Johnson's note being clearly due to Green.

With respect to the first point, it is to be observed that the respondent was in possession of Johnson's note as endorser; and the fact of the absolute endorsement by Green was *prima facie* evidence of a full and adequate consideration paid for the note. The respondent was under no necessity of inquiring into it; but he did allege that the consideration was a full and valuable one. This the appellant might have denied; and had it been incumbent on the respondent, he must have proved his allegation, or failed in the suit. The burthen of showing that the consideration was illegal or inadequate rested on the appellant. When he goes into a charge of usury he departs from the question put to him, which admitted only of an affirmative or negative answer; and it was wholly immaterial whether it was the one or the other. I view, therefore, the appellant's answer, charging usury, as insisting on a distinct fact, by way of avoidance. The respondents having replied, and given him an opportunity to prove the fact, and he having failed to do so, his answer is no evidence of the fact. This is a well established principle in chancery proceedings, and will be found recognized in every treatise on evidence in that court.

Courts of equity consider mortgages according to the essential nature of contracts, and give them operation according to the intention of the parties: the debt is, consequently, there esteemed the principal, and the land the incident; and whenever the debt is discharged, the interest of the mortgagee in the land ceases of course. There is, then, a manifest distinction between absolute estates in fee and conditional estates for securing the payment of money. Mortgages are not now considered as conveyances of lands within the statute of frauds; and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage. (Powell, 3d edit., Mort. 54; Barnard, 90; *Richard v. Sims*, 2 Burr. 979.) If, however, a mortgage was within the statute, the circumstances of this case would exempt it from its operation. In case of

No decision
as to this.
See ind.

Eq. Pl.
↑

Use in
Eq. Pl.

up later

See below

Means surrender
of wife's security.

the payment of the money secured by mortgage, in equity a trust arises for the benefit of the mortgagor; so, where the debt thus secured is transferred by the mortgagee, he becomes a trustee for the benefit of the person having an interest in the debt. (2 Anstruther, 438.) In the case of *Martin v. Mowlin*, 2 Burr. 979, Lord Mansfield lays it down as an established principle, that the assignment of the debt will draw the land after it; and I cannot agree that this was an *obiter dictum* of the judge.

In the present case the mortgage was delivered to the assignee of the debt. Had it not been delivered, nor anything said about it, I should have considered the respondent, on the failure of Johnson to pay the note, entitled to the aid of the mortgage. It was competent to the parties to agree that the mortgage should not be resorted to by the holder of the note; but the proof of such agreement lies on the appellant, and it should be explicit. The receipt furnishes no evidence of such agreement; it describes the real situation of the mortgage as not assigned. But this expression falls far short of an agreement that it was not to be assigned. It does not appear that the appellant had any rights prejudiced by the assignment of the mortgage; and it is impossible to evade the force of the fact of his depositing it in the respondent's hands. It speaks a language incapable of being misunderstood, and is decisive of the question. An issue to investigate the intention of the parties, on that act, would have been useless. I therefore think that the respondent had an equitable interest in the mortgage equivalent to the amount of the principal and interest of his note against Green.

I shall be very brief on the last point, because I understand the chancellor as saying, in assigning his reasons, that the question of distributing the fund to be produced by the sale is yet before him. The master's report furnishes him the necessary data on which to make a just distribution; and it would be unnecessary to give directions on that subject, the respondents not claiming anything beyond the principal and interest of the appellant's note, and his costs, to which I think him well entitled. The decree ought to be affirmed with costs. I cannot think, however appearances may be, that the respondent, or his counsel, considered the points now decided as necessarily or absolutely adjudged on the former appeal; and I am, therefore, disinclined to allow anything beyond the taxable costs.

as to 3rd point

*Judgment of affirmance.*¹

¹*Southerin v. Mendum*, 5 N. H. 420 (1831); *Whittemore v. Gibbs*, 24 N. H. 484 (1852); *Ord v. M'Kee*, 5 Cal. 515 (1855), accord.

Unit of entry = ejentment.

Adams made utge to Earle to secure 6 notes.

Earle 20th Nov. left utge deed WARDEN v. ADAMS.

& 2nd notes, to be assigned to

Warden, with a scrivener. Nov. 27th

Hamilton took one note as so - (15 Mass. 233.)

Curly - for a debt due him by Earle

& took as -

Seignement of

utge & deed

of property.

Nov. 28th Earle

Completed the

assignment

of 2 notes &

utge deed to

Warden. As

Seignement is

writing on

back of

utge deed.

Adams is a

free. a tenant

to Hamilton.

Held for debt.

Hamilton got

the assignment

of land. Dr.

delivery of

utge deed

to scrivener

under St. Frs.

passed nothing

*Full
rpt.*

*In Mass. St. v.
quies writing
to make trans.
for mortgage.
Dr. delivery not
enough. nor
necessary.*

This was a writ of entry by the said Warden, as assignee of a mortgage made by the said Adams to one John Earle.

The action came on for trial before the Chief Justice at the last April term in this county, and the parties agreed that the following facts should be considered as proved in the case, viz.: The said Adams made and executed the mortgage deed declared on, conditioned for the payment of six promissory notes made by the said John and one Lewis Adams, payable to the said Earle or his order. Afterwards the said Earle became insolvent, and from the 15th of November to the 5th of December, 1815, was in failing circumstances. Previously to the assignment hereafter mentioned Earle had pledged one of the said notes to a person not interested in this suit, but did not assign or deliver over to him the mortgage deed as security, and he afterwards redeemed the note, which he had since transferred to one Sewall Hamilton, but not until after the execution of the assignment to Warden. On the 20th of November, 1815, he deposited with a scrivener two of said notes, and also the mortgage deed, for the purpose of having an assignment thereof made to Warden to secure a debt due from Earle to him.

*Apparently
a 4th note about
rd. no? raised
in case.*

On the 27th of the same November, Earle endorsed one of the said six notes to said Hamilton, as part security for a debt due him from Earle, and at the same time assigned said mortgage deed and the premises therein mentioned to Hamilton, by his deed duly acknowledged and recorded on the same day: the said assignment being made on a separate piece of paper, and referring to the mortgage.

On the 28th of said November, the said Earle executed an assignment of said mortgage deed, on the back thereof, to said Warden, as security for his said debt to him and of some debts due from Earle to certain other persons, which Warden was to assume. This assignment was not acknowledged or recorded. The mortgage deed and the two notes, left with the scrivener for the purpose of having an assignment made, remained in the scrivener's hands until the actual execution of the said assignment to Warden. Hamilton recovered judgment for possession of the mortgaged premises against Adams, and possession was delivered to him by the proper officer: and Adams afterwards entered and continued in possession by a parol lease from the assignee of Hamilton.

(1) Seem delivery to scrivener clearly no present assignment in Equity or otherwise or no intent that that shd be assignment — intent was that assignment shd take place when formal papers prepared by Scrivener were executed. Warden got no Equity on 20th & So Hamilton got his title clear whether he was a B. F. P. or not.

(2) Ct rather assumed intent to make present assignment by delivery to Scrivener. Could be only good as an Equity notice of notice's interest. By analogy to deposit of title deeds or like. Prob. shd be held bad as violating St. Fds. as we have seen. Even beyond title deeds cases. So case clearly O.K. Seem that is good of Ct.

(3) Anyhow no Equity notice in Mass. at this time. Up ante. ~~That really good Ct. goes on says under St. Fds~~

(4) If had been valid Equity notice of course Hamilton, having knowledge of it when he took his assignment, wd take subject to it. But even so Warden cd not bring Equityment (here writ of Entry) on his equitable title.

The demandant offered to prove, by the testimony of Earle, that when he made the assignment to Hamilton, and prior to that time, Hamilton knew that the original mortgage deed was in the hands of the scrivener, for the purpose of an assignment being made to the demandant, for securing the payment of the two notes transferred to him as aforesaid.

But the Chief Justice, being of opinion that the demandant could not maintain his action, in consequence of the prior assignment to Hamilton, under which the tenant is in possession, and also that Earle was not a competent witness to prove the fact for which he was offered, if such fact were material, directed a nonsuit, which was to be set aside and a new trial granted, if upon the above facts, together with the said knowledge of Hamilton, this action could be maintained.

Burnside and Bangs, for the demandant.—The delivery of the mortgage deed, together with the notes endorsed, for the purpose specified, amounted to such an equitable assignment as the law will protect. It is said by Lord Mansfield in the case of *Martin v. Mowlin*, 2 Burr, 978, that “a mortgage is a charge upon the land: and whatever would give the money will carry the estate along with it, to every purpose. The estate in the land is the same thing as the money due upon it.” “The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds.” This doctrine is recognized and confirmed by the Supreme Court of New York in the case of *Green v. Hart*, 1 Johns. 580; see also *Powell on Mortgages*, 186 to 190; 11 Mass. Rep. 475. Then the second assignment by Earle to Hamilton, with the knowledge of the latter of the prior transaction, was fraudulent and void as to the demandant. And if we should be debarred from fixing this knowledge upon him, we contend that he must be presumed, from the facts found in the case, to have known of the delivery of the deed to the scrivener, and the purpose of such delivery. The absence of the mortgage deed should have put Hamilton on his guard; and he is chargeable with fraudulent motives in taking an assignment under such circumstances. It can make no difference that but two of the six notes were endorsed to the demandant. The mortgage was given as security for these two notes, and might legally and equitably be assigned with them.

That Earle was a competent witness, we refer the court to the cases of *Loker v. Haynes*, 11 Mass. Rep. 498; *The Inhabitants of Worcester v. Eaton*, *ibid.* 368, and *Hill v. Payson & al.*, 3 Mass.

Rep. 559. He was not offered to impeach his own deed, but merely to postpone the security intended to be given by it.

Newton for the tenant.—The assignment to Hamilton was prior to that to the demandant, and being in every circumstance conformed to the requisitions of the statute, must have the preference. The assignment of a mortgage is a conveyance of the rents and profits. (11 Mass Rep. 474, *Goodwin v. Richardson, Adm.*) Then the assignee has such an interest in the land as cannot pass without writing.

The dictum of Lord Mansfield in the case of *Martin v. Moulin* has been completely put down by Judge Trowbridge in his tract upon mortgages (8 Mass. Rep. 557, and *seq.*); and it may well be presumed that if the judges, who agreed in the decision in the case of *Green v. Hart*, had read that tract, they would not have given the opinion they did. That decision was, however, in chancery, and is no precedent for the government of this court.

If the fact proposed to be proved by the testimony of Earle were legally in evidence, it would not better the demandant's case. (See 12 Mass. Rep. 523; 11 Mass. Rep. 342; 5 Mass. Rep. 133.) Hamilton had the first legal assignment of the mortgage, and there was no fraud in the transaction: for Earle had a right to prefer making him secure, rather than another. All that the demandant can complain of amounts to nothing beyond a violation of a promise or undertaking, on the part of Earle, to give him the preference. (5 Mass. Rep. 144.)

By the Court. By force of our statutes regulating the transfer of real estates and for preventing frauds, no interest passes by a mere delivery of a mortgage deed without an assignment in writing and by deed.

An assignment, made by a separate deed, without the delivery over of the original mortgage deed, conveys all the interest of the mortgagee, and makes the grantee the assignee of the mortgage.

The knowledge imputed in this case to Hamilton, the assignee, of an intention on the part of Earle, the mortgagee, to assign the mortgage to the demandant, does not impair the tenant's title: he being a *bonâ fide* creditor, and having a right, by his vigilance, to secure his demands in this way: just as he would have had by an attachment, although he might know that another creditor intended to make an attachment, and had taken incipient measures therefor.

The nonsuit is not set aside.¹

¹*Smith v. Kelley*, 27 Me. 237 (1847); *Adams v. Parker*, 12 Gray (Mass.) 53 (1858); *Cottrell v. Adams*, 2 Biss. (Ill.) 351 (1870); *Williams v. Teachey*, 85 N. C. 402 (1881), accord.

In 12 Gray was written assignment on back of mtge. to ptef. Deft took by a later deed. Hld ptef ed not foreclose at law by writ of entry as had no legal title — deed to ptef nec. 1858.
In 27 Me. hld tender ed not be made to transferee of mtge debt but who held no deed to land as mtge int could have w. deed. Also in another gd.
85 Me. was assignment under Seal of "mtge". Hld did not pass legal title as that not intended & since no word "heirs" ind.

on d. Curtis
JACKSON v. BRONSON.

Mtgee only has a chattel interest + so mtgor may maintain Ejectment vs. him, SUPREME COURT OF JUDICATURE OF NEW YORK, 1822.

(19 Johns. 325.)

or (in this case) his transfers. Ejectment for land in Onondaga, tried before Mr. Justice Yates at the Onondaga Circuit in June, 1821. The lessor of the plaintiff proved a title under Abijah Earl, for a lot of sixty acres, by a deed to him, dated 3d of March, 1801, duly recorded on the same day, and that the defendant was in possession of six acres of the land. The defendant proved a mortgage from Curtis to Earl, dated March, 1801, of the whole lot, to secure payment to the State of \$405.62, and to indemnify Earl. Also, a deed from Earl to the defendant for the premises in question, dated 5th of June, 1804. A verdict was taken for the plaintiff, subject to the opinion of the Court, on a case which was submitted to the Court without argument.

Per Curiam. It is now well settled, that the mortgagee has a mere chattel interest; and the mortgager is considered as the proprietor of the freehold. The mortgage is deemed a mere incident to the bond or personal security for the debt; and the assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity.

In the case of *Runyan v. Mersereau*, 11 Johns. Rep. 534, it was decided that the mortgager, or a purchaser of the equity of redemption, may maintain trespass against the mortgagee, or a person acting under his license. There the defendant pleaded *liberum tenementum*; and the plaintiff (the purchaser of the equity of redemption) replied, that the freehold was in himself; and there was judgment for the plaintiff. Here the question is, whether Curtis, the mortgager, can maintain an ejectment against Bronson, who appears as a grantee, by deed in fee-simple, under the mortgagee.

We are of opinion that the plaintiff is entitled to judgment.¹

¹*Ellison v. Daniels*, 11 N. H. 274 (1840), *Peters v. Jamestown Bridge Co.* 5 Cal. 335 (1855), accord. See also *Merritt v. Bartholick*, 36 N. Y. 44 (1867).

PAGE v. PIERCE.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1853.

(26 N. H. 317.)

WRIT OF ENTRY, brought by the plaintiffs to foreclose a mortgage made by the defendant to Hiram Munger, and which they claim to hold by virtue of the sale and indorsement to them of a note secured thereby.

The case was submitted to the court upon papers exhibited by the parties.

The first was a mortgage deed conveying the premises from the defendant to Hiram Munger for the security of five notes for \$100 each, payable to Munger or order at different times, one of which, being the last payable, was indorsed before maturity to the plaintiffs. The four other notes were, together with the mortgage, assigned by Munger to Pliny Cadwell by an instrument under seal, which was duly recorded. The notes so assigned were afterwards paid by Pierce to Cadwell, who thereupon gave a written discharge of the mortgage, which was also duly recorded on the margin of the mortgage record.¹

WOODS, J. It is settled in this State that the assignment of a debt secured by a mortgage of land is ipso facto an assignment of the security also. (*Southerin v. Mendum*, 5 N. H. Rep. 420; *Rigney v. Lovejoy*, 13 N. H. Rep. 247, and cases there referred to.) And it is also settled that the interest of a mortgagee is incapable of being conveyed by him, except in connection with the debt secured by the mortgage, and as a mere incident or appurtenance to it. (*Ellison v. Daniels*, 11 N. H. Rep. 274, and cases there cited.) It was held in *Rigney v. Lovejoy*, before referred to, that the parol assignment of a negotiable note secured by a mortgage, although it did not authorize the assignee to sue for the debt in his own name, carried with it the mortgage interest, and enabled the assignee, by his writ of entry, to assert his claim to the land in his own name.

As a corollary to the doctrine that an assignment of the debt carries with it the mortgage, it has been held that where the debt consists of several bonds or notes the assignment of each operates, *pro tanto*, an assignment of the mortgage. In *Lowe v. Morgan*, 1 Bro. C. C. 268, the mortgagee had assigned to a trustee in trust for three persons who had contributed equal proportions of the money. One of the three brought a bill to foreclose, and took a decree. But the cause stood over to enable him to make the other two parties, be-

¹This brief statement of facts is abbreviated from that given in the report.

Mtge to secure
5 notes. 1 en-
dorsed to plty's
1853. Other 4 to
Cadwell & mtge
also assigned

to him.
He was
hd & re-
leased
mtge. He'd
help can
hold it.
Assign-
ment of
debt car-
ries mtge
& of part
of debt car-
ries part
of mtge.
and assign-
ee is full.
hd but
help an
not. Re-
leased
not re-
lease
plty's
interest.

Is mtg of entry
treated as
q. or law.

(1) Case is clearly O.K. as every one agreed that in absence of special contract each part of debt is secured by mortgage. No? of priorities in the case.

(2) See cards as to priorities as between the assignees. Also that Central may alter priorities.

cause it was deemed impossible for one to foreclose without the others. In *Cooper v. Ullman*, Walker's Mich. Ch. Rep. 251, it was held that the assignment of one of several notes secured by mortgage carries with it a proportional interest in the mortgage, unless it is agreed between the parties at the time that no interest in the mortgage is to pass to the assignee. In *Stevenson v. Black*, Saxton's N. J. Rep. 338, it was held that where the mortgage is made to secure several bonds, and the mortgagee assigns them to different persons, and the mortgage to one of them, the several assignments of the bonds operate, *pro tanto*, an assignment of the mortgage. And if he to whom the assignment of the mortgage and of one of the bonds is made buys in the equity of redemption, the mortgage is extinguished as to the bond held by him, but will continue as a security for the residue of the bonds. In *Crane v. March*, 4 Pick. Rep. 136, the same general principle is involved in the conclusion to which the court arrived. In *Betz v. Heebner*, 1 Penn. 280, it was decided that an assignee of one of the bonds took the benefit of the mortgage made to secure it, although at the time of the assignment he did not know there was such mortgage; and that he should not be postponed to subsequent assignees of the other bonds, to whom the mortgage likewise was assigned, although the latter did not know that the first-named bond was unpaid. In *Cullum v. Erwin*, 4 Ala. 452, it was also held that an assignment of one of several notes secured by a mortgage was an assignment, *pro tanto*, of the mortgage, and if the property was insufficient security for the whole, such assignee should have a preference over the mortgagee; which preference was not disturbed by a subsequent assignment of the other notes; each of which took priority of lien in the order of its assignment, without regard to the order in which they severally fell due; but that the assignor might at the time of the assignment give a preference to one or more of the assignees. ?

In *Langdon & a. v. Keith*, 9 Verm. 299, of the several notes secured by the mortgage, all but one was assigned with the mortgage, to one from whom the defendant received them. The material part of the first assignment was in these words: "We do hereby grant, bargain, sell, transfer and make over to said R., his heirs, &c., the above mortgage deed and premises therein described, and the notes in the condition mentioned, except the fifty-five dollar note," &c. The defendant, after he became possessed of the notes and mortgage, made further advances to the mortgager, and took a second mortgage of the same property. And the question was, whether the fifty-five dollar note named in the first mortgage, and excepted out of the assignment, should take precedence of this second mortgage. And it was held that it should not. First, because the defendant was an innocent purchaser, having no notice

that the fifty-five dollar note was unpaid, or that the plaintiffs claimed an interest in the mortgage, which they had in terms fully assigned. Second, because it was clearly competent for the parties to the first assignment to agree as they did agree, that the whole mortgage should pass. Mr. Chancellor Collamer cites the language of the Court in *Wright v. Wright*, 2 Aik. Rep. 212, in these words: "If the mortgagee choose to assign all his interest in the mortgaged premises, to secure but a part of the notes therein assigned by him, he has a right to do so, and in such case, no interest in the premises could remain in him." And the Chancellor concludes that the assignment "clearly conveys the whole mortgage, and all the notes except one." "It is however true," he adds, "that as against Mead (the mortgager), this mortgage may be kept on foot for the security of all for which it was given, until paid by him or legally discharged. The orators may have the right to pay Keith, the defendant, both his mortgages, and redeem as to him and them, and hold the mortgages for all the debts therein mentioned against Mead."

These cases all maintain or admit the principle, that the mortgage is a mere attendant upon the debt, and in the absence of an agreement, express or implied, to the contrary, if the debt be assigned in parcels to different persons, the mortgage will follow and give equal protection to these fragments, into whose hands soever they may pass by any proper mode of transfer. Whether mere priority of assignment affords the note or bond that is the subject of it, the preference asserted in some of the cases, it is not necessary here to decide; because the notes first assigned, in this case, were fully paid, and the property exonerated with respect to them on the fourteenth of December, 1850.

From the principle laid down in *Ellison v. Daniels*, before cited, it might be fairly inferred that the assignment from Munger to Cadwell, on the 18th of January, 1849, conveyed no interest in the mortgage, beyond what was properly appurtenant to the notes then assigned to him, for the reason that Munger had no power to assign, and Cadwell no capacity to take, any interest in the land or the mortgage, except to the extent of securing those notes. But it is not necessary so to decide in this case. And it is not necessary to decide whether an assignment of a mortgage with part of the debt, in the terms used by the parties on the 18th of January, 1849, has or has not the effect of giving priority to the accompanying notes, over those retained by the mortgagee; nor whether that priority, having so attached, would be disturbed in favor of a party taking the residue of the notes from the mortgagee, by a subsequent assignment, without notice. These questions, unavoidably sug-

gested by the cases referred to for a different purpose, are not concluded by the decision of the one before us. It may be admitted that the assignment of the mortgage to Cadwell carried the whole mortgage, as in the case of *Langdon v. Keith*, with the qualification admitted in that case. For here is no subsequent purchaser without notice, and no mesne incumbrancer, who by the principles of that case, could interpose between this plaintiff and the security.

But here the plaintiff, the assignee of one of the notes, is entitled, even upon the theory of that case, to an interest in the mortgage. The party against whom he seeks to enforce it is the mortgager himself, and the maker of the note. He did not, like the defendant in *Langdon v. Keith*, advance money upon the land in faith of an assignment of the mortgage to Cadwell, and of Cadwell to himself, and in ignorance that the other note was outstanding and unpaid, which was the strong feature in that case. On the contrary, when he took from Cadwell the formal discharge of the mortgage, he knew it was not paid; that before he could rightfully hold the land, there was a note of \$100 with which he had himself charged it, still outstanding against him, which he must pay. He could not, therefore, have supposed that any discharge which Cadwell could give him would exonerate the land, and without imputing a sinister design to the party, we cannot suppose that he intended, in taking the discharge, to give any such effect to it.

The conclusion therefore is, that the plaintiffs were, from and after December 14, 1850, sole assignees of the mortgage of the premises, by virtue of the purchase of one of the notes secured by it, and the payment of the others, which had been assigned to Cadwell.

52 pl. When two or more are interested as mortgagees or assignees of a mortgage, it has been held that they are all necessary parties to a bill to foreclose. (*Palmer v. Carlisle*, 1 Sim. & Stu. 433; *Lowe v. Morgan*, before cited.) But where the interest of all but one has been extinguished, there seems no reason why he may not proceed alone. (*King v. Harrington*, 2 Aiken, 33.) The plaintiffs in this case are joint assignees of the mortgage, and as such are entitled to maintain this action to foreclose the mortgage.¹

Judgment for the plaintiffs.

¹*Phelan v. Olney*, 6 Cal. 479 (1856), accord. Compare *Keyes v. Wood*, 21 Vt. 331 (1849).

BARRETT v. HINCKLEY.

SUPREME COURT OF ILLINOIS, 1888.

(124 Ill. 32.)

Appeal from the Superior Court of Cook County; the Hon. Joseph E. Gary, Judge, presiding.

MR. JUSTICE MULKEY delivered the opinion of the Court:

Watson S. Hinckley, claiming to be the owner in fee of the land in controversy, on the 26th day of February, 1885, brought an action of ejectment, in the Superior Court of Cook County, against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court, without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed.

The evidence tends to show the following state of facts: In 1870 Thomas Kearns was in possession of the land, claiming to own it in fee simple. On August 3 of that year he sold and conveyed it to William H. W. Cushman for the sum of \$80,000. Cushman gave his four notes to Kearns for the balance of the purchase money,—one for \$12,500, maturing in thirty days; three for \$16,875 each, maturing, respectively, in two, three and four years after date, and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878 Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned, by a separate instrument in writing, the mortgage and note to the appellee, Watson S. Hinckley.

This is, in substance, the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did.

It is claimed by appellants, in the first place, that much of the evidence relied on by appellee to sustain the judgment below was improperly admitted by the court, and various errors have been assigned upon the record questioning the correctness of the rulings of the court in this respect. They, however, go further, and insist that, even conceding the facts to be as claimed by appellee himself,

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(1) True no doubt on the title theory. On lien theory only necessary that St. Fred. be complied with to have legal int. in lien. Question not important in lien states as mortgage hasn't any C. L. rights to assert to anything anyhow & as he becomes equit. assignee by transfer of mortgage debt he gets ^{almost} all the ~~as~~ equit. transference that he could get if legal transference. Whether a legal transference he might become a B. F. P. is discussed later. ^{Perhaps if only Eq. transference and not have C. L. action for impairing security.} Erroneous cases in U. H. right neither by title nor by lien theory.

(2) Need not have warranty deed to convey legal title of Cerritos.

(3) Dictum at End of case seems only authority on pt. If right must be a case of Ct. of law recognizing an equit. def. & in Ill. vs. any St. allowing equit. def.

they are not sufficient in law to sustain the action. As the judgment below will have to be reversed on the ground last suggested, it will not be necessary to consider the other errors assigned.

We propose to state, as briefly as may be, some of the reasons which have lead us to the conclusion reached. In doing so, it is perhaps proper to call attention at the outset to some considerations that should be steadily kept in mind as we proceed, and to which we attach not a little importance.

It is first to be specially noted, that this is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee simple. To do this, he is bound to show in himself a fee simple title at law, as contradistinguished from an equitable fee. (*Fischer v. Eslaman*, 68 Ill. 78; *Wales v. Bogue*, 31 id. 464; *Fleming v. Carter*, 70 id. 286; *Dawson v. Hayden*, 67 id. 52.) Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title, however, seems to be Mrs. Kearns, as administratrix of her husband, and Greenebaum, as pledgee of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns' estate, and Elias Greenebaum, the banker. At the time of the purchase a separate writing was given to me,—a full assignment. . . . It was a very explicit assignment, or full assignment of the note and mortgage and the land, the property, and all the right and title to the land." It will be observed, the instrument is throughout characterized as an assignment only, which does not, like the term "deed," or "specialty," signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness' opinion upon a question of law. There is not being sufficient evidence in the record to show that the assign-

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ment was under seal, it follows that even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum, or either of them, it could not have passed to the appellee by that instrument, and if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is, of course, based upon the fundamental principle that an instrument inter partes, in order to pass the legal title to real property, must be under seal. *Contract*

But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence, there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. *Nemo plus juris ad alium transferre potest quam ipse habet.* That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff, is demonstrable by the plainest principles of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it, by way of mortgage, to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the States of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear, appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do or attempt to do. Indeed, he does not claim through them, nor either of them. Not only so, neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee. Nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it

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may be asked, what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity, or of law, are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. (*Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 id. 213; *Chickering v. Raymond*, 15 id. 362.) As to the mortgage, it is well settled that could not be assigned, like negotiable paper, so as to pass the legal title in the instrument or clothe the assignee with the immunity of an innocent holder, except under certain circumstances, which do not apply here. (*Chicago, Danville and Vincennes Railway Co. v. Loewenthal*, 93 Ill. 433; *Hamilton County v. Lubukee*, 51 id. 415; *Olds v. Cummings*, 31 id. 188; *McIntyre v. Yates*, 104 id. 491; *Fortier v. Darst*, 31 id. 213.) But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. (2 Washburn on Real Prop., p. 115, and authorities there cited.) Yet the assignors in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that by virtue of the assignment the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is, perhaps, no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common law courts of Eng-

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land, and which has obtained, with certain limitations, in most of the States of the Union, including our own, in which the common law system prevails.

In *Carroll v. Ballance*, 26 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor to recover the mortgaged premises, this court thus states the English rule on the subject: "In England, and in many of the American States, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition,—citing Coote on Mortgages, 339; *Blaney v. Bearce*, 2 Greenlf. 132; *Brown v. Cramer*, 1 N. H. 169; *Hobart v. Sanborn*, 13 *id.* 226; *Northampton Paper Mills v. Ames*, 8 Metc. 1. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in *Nelson v. Pinegar*, 30 Ill. 481, which was a bill by a mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the *jus in re* as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner." So, in *Oldham v. Pfleger*, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law, the owner of the fee, having in the *jus in re* as well as the *jus ad rem*." In *Finlon v. Clark*, 118 Ill. 32, the same doctrine is announced, and the cases above cited are referred to with approval. (*Taylor v. Adams*, 115 Ill. 574.)

Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law because of non-payment on the very day fixed by the mortgage as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land, on equitable terms, at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mort-

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gagee was simply a lien and incumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity. These two systems grew up side by side, and were maintained for centuries without conflict, or even friction, between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was, of course, necessary, to make his title available in a court of law.

In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country, resulting chiefly from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles applicable to them, respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of laws. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the States, and the failure of the courts and authors to note those changes in their expositions of the law of such States. Perhaps another fruitful source of confusion on this subject is the fact that in many of the States the common law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that although the action, in theory, is one at law, it is nevertheless subject to be defeated by a purely equitable defence.

Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has, in many of these States, entirely superseded the legal one. Thus, in New York it is said, in the case of *Trustees of Union College v. Wheeler et al.*, 61 N. Y. 88, that "a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon, the mortgagor remaining both the legal and equitable owner of the fee." Following this doctrine to its logical results, it is held by the courts of that State that ejectment

under the code will not lie, at the suit of the mortgagee, against the owner of the equity of redemption. (*Murray v. Walker*, 31 N. Y. 399.) In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee, before foreclosure, without an assignment of the debt is, in law, a nullity. (*Jackson v. Curtis*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 231; *Jackson v. Willard*, 4 Johns. 41.) And this court seems to have recognized the same rule as obtaining in this State, in *Delano v. Bennett*, 90 Ill. 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the authorities already cited. The doctrine would seem to be fundamental, that if one *sui juris*, having the legal title to land, intentionally delivers to another a deed therefor containing apt words of conveyance, the title, at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt. (*Sanger v. Bancroft*, 12 Gray, 367; *Barnard v. Eaton*, 2 Cush. 304; *Jackson v. Willard*, 4 Johns. 40.) It is true, the interest which passes is of no appreciable value to the grantee. Thus, in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In 4 Wait's Actions and Defences, page 565, the rule is thus stated: "By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, Pomeroy, in his work on Equity Jurisprudence (vol. 3, page 150), in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death, intestate, it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator."

We have already seen, that under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper; but.

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on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even to a third party, by deed, with apt words of conveyance, and the fact that it is, in form, an assignment, will make no difference. (2 Washburn on Real Prop. 115, 116.) Such an assignee, if owner of the mortgage indebtedness, might, no doubt, maintain ejectment in his own name, for his own use; or the action might be brought in his name, for the use of a third party owning the indebtedness. (*Kilgour v. Gockley*, 83 Ill. 109.) So in this case, if the action had been brought in the name of Kearns' heirs, for the use of Hinckley, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we have said, that the dual system respecting mortgages, as above explained, exists in this State precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact, that the equitable theory of a mortgage has, in process of time, made in this State, as in others, material encroachments upon the legal theory, which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. (*Hall v. Lance*, 25 Ill. 250, 277; *Emory v. Keighan*, 88 id. 482.) As a result of this doctrine, it follows that in ejectment by the mortgagor, against a third party, the defendant can not defeat the action by showing an outstanding title in the mortgagee. (*Hall v. Lance*, *supra*.) So, too, courts of law now regard the title of a mortgagee in fee, in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the Statute of Limitations, the mortgagee's title is extinguished by operation of law. (*Pollock v. Maison*, 41 Ill. 516; *Haris v. Mills*, 28 id. 44; *Gibson v. Rees*, 50 id. 383.) Hence the rule is as well established at law as it is in equity, that the debt is the principal thing, and the mortgage an incident. So, also, while it is indispensable in all cases to a recovery in ejectment, that the plaintiff show in himself the legal title to the property, as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title, he may, under all circumstances, maintain the action,—and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests,—that is, as a means of coercing payment. If the mortgagee, therefore, should, for a valuable consideration, assign the mortgage indebtedness to a third party, and the latter, after default in pay-

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ment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee, although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well settled principle, that one having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, can not maintain ejectment against the equitable owner, or any one having an equitable interest therein with a present right of possession. This case, with a slight change of the circumstances, would afford an excellent illustration of the principle. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who hold the legal title, had brought ejectment against him, the action clearly could not have been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. (*Cottrell v. Adams*, 2 Biss. 351; 9 Myers' Fed. Dec. 240.) The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See, also, *Speer v. Haddock*, 31 Ill. 439. Pe.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.¹ PC

Judgment reversed.

¹See *Torrey v. Deavitt*, 53 Vt. 331 (1881); *Jordan v. Cheney*, 74 Me. 359 (1883).

was bond to Shepherd & wife assigned to him to secure that bond. Would that make Shep. head utgee? Pretty clearly legal estate was in Baker originally. Unless assignment by Baker to Shephard was good as a conveyance Baker still has legal title, unless it vested in Matthews when Baker was pd. So all Shephard had was an Equit. utge. But he did have that as St. Fads. was complied with.

(2) Defts are assignees of this Equit. utge. Bond of course was non-reg. So depts have neither legal title to the land nor legal title to the debt. They must take \therefore subject to Equities of Matthews & so subject to the personal defence of payment after maturity. All law is accord.

(3) Court apparently see p. 647 \leftarrow thought not assignee got legal ^{life} estate. They turned down the argument that that made them B.F.P's, on grd that they took that with notice that it was security for a debt & so can't hold it beyond that debt. Seems sound. Seldone contended that getting title to property makes any dif. Shd not be accord.

Order
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CHAPTER IV. (continued.)

SECTION II. EFFECT OF TRANSFER.

MATTHEWS v. WALLWYN.

HIGH COURT OF CHANCERY, 1798.

(4 Ves. 118.)

Thomas Matthews, being tenant for life of real estates, applied to Wallwyn Shephard, who was his solicitor, to procure him the sum of 2000*l.* Shephard accordingly procured John Baker to advance that sum upon the mortgage of the estates, of which Matthews was tenant for life, and an assignment of a policy of insurance for 2000*l.* made by Matthews for his life in January, 1788. That mortgage and assignment, dated the 20th of May, 1788, were executed accordingly to Baker, his executors, administrators and assigns, for ninety-nine years, if Matthews should so long live, subject to redemption; with a covenant, that Matthews would keep the said sum of 2000*l.* insured for his life.

Baker having been afterwards paid by Shephard, Matthews gave Shephard a bond for 2000*l.*, dated the 25th of March, 1791, and by indentures of the same date the mortgage and the policy of insurance were assigned to Shephard. In January, 1792, Shephard borrowed from Hercy and Co., bankers, the sum of 2000*l.*; and on that occasion he deposited with them the indentures of the 20th of May, 1788, and the 25th of March, 1791, and the bond and the policy of insurance, and a note, under his hand, declaring that the said instruments were deposited as a security for that sum with interest. In March, 1794, Hercy and Co. calling for repayment, Shephard applied to Wallwyn and Co., bankers, to open an account with him; requesting them to lend him 2000*l.*, and proposing to deposit the deeds and securities then in the hands of Hercy and Co., as a security, and representing that it would be necessary to have part of such moneys for the purpose of redeeming them, before he could deliver them to Wallwyn and Co. They consented to open an account with him, and to advance or give him credit for the sum of 2000*l.* upon the proposed security and the farther security of his note. On the 21st of March, 1794, they advanced him the sum of 1000*l.* for the purpose of redeeming the se-

Matthews mortgaged property to Baker for a 2000*l.* advance. Negotiated thru Shephard Matthews' atty. Shephard l'd Baker & unknown to Matthews assigned or had mortgage assigned to Shephard. Shephard assigned it to ~~Wallwyn~~ for advances, unknown to Matthews. Matthews file bill to redeem on paying what he owes Shephard on bal of *q*/co. Defts wish to make pl'tf pay what Shephard owes them in order to redeem. Held for pl'tf. Assignee of mortgage takes subject to state of *q*/co books. mortgagee.

curities; and upon the 24th of March he deposited all the said securities with them, and gave them his promissory note at three months for 2000*l.* and interest, and he wrote a note declaring the purpose of the deposit. Afterwards, before the 24th of June, 1794, he drew upon them to the amount of 1431*l.* 9*s.* 4*d.* exclusive of the 1000*l.* originally advanced. They received upon his account only 600*l.*, and, upon the 24th of June, 1794, when his note became due, the balance due to Wallwyn and Co. was 1856*l.* 13*s.* 5*d.* In January, 1795, Shephard became a bankrupt. By indentures, dated the 29th of September, 1797, executed in pursuance of a decree made at the Rolls upon the 14th of June, 1797, upon a bill filed by Wallwyn and Co. in December, 1794, the assignees of Shephard assigned all the said securities to the plaintiffs in that cause. Matthews was made a defendant in that suit; but before the hearing the plaintiffs had the bill as against him dismissed with costs.

Shephard, as the attorney and solicitor of Matthews, was in the habit of receiving and paying large sums of money upon his account, and the premiums upon the policy of insurance were paid by him, and charged in account with Matthews. Upon the bankruptcy of Shephard, Wallwyn and Co. paid one premium upon that policy, which became due in January, 1795. By an account settled and signed by Matthews and Shephard upon the 11th of October, 1794, a balance of 4400*l.* appeared due to Shephard. Matthews had no notice of Shephard's transactions with Hercy and Co. and Wallwyn and Co. as to the securities assigned to him by Matthews, till the bill was filed against him in December, 1794.

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tion.* This bill was filed by Matthews against Wallwyn and Co. and against the assignees of Shephard, who was dead, praying that the assignees of Shephard may be decreed to come to a fair settlement of accounts depending between the plaintiff and Shephard; and that the plaintiff may be at liberty to redeem the mortgaged premises, if any thing shall appear to be due from him upon the settlement of accounts in respect of the said mortgage; and that the defendants Wallwyn and Co. may re-convey and re-assign to the plaintiff the mortgaged premises, and deliver up the said securities to be cancelled; and that they may be restrained by injunction from proceeding at law—the plaintiff offering to pay what, if any thing, shall appear to be due from him upon the aforesaid settlement of accounts on account of the said mortgage.

The bill charged that the plaintiff, having been informed by some of Shephard's friends that he was in an embarrassed situation, but that, if the plaintiff would give him a security for the balance then due to him, it would be of infinite service to him in enabling him to settle with his creditors, and the plaintiff being

willing to assist Shephard, and imagining himself to be more in debt to him than he really was, promised to do so, when the account should be properly made out and settled. In a few hours Shephard produced an account, and requested the plaintiff to sign it; and the plaintiff did sign it at his earnest solicitation, and upon his agreeing to permit the plaintiff to take it into the country for the purpose of examining it and making such alterations as should be proper. The plaintiff has since discovered that Shephard previous thereto had received for the plaintiff's use divers sums of money, for which he had not given the plaintiff credit in the account; and that if such sums together with several sums received by him since signing the account were deducted, a considerable balance would be due to the plaintiff; especially as he has also discovered that several sums, with which he was charged in the account as having been paid by Shephard, were not paid by him.

The defendants Wallwyn and Co., by their answer, submitted that Shephard being the plaintiff's attorney was sufficient notice to him, and that they are entitled to a specific lien upon the mortgaged premises and securities in respect of the sum of 1855*l.* 13*s.* 5*d.*, the balance due to them from Shephard upon the 24th of June, 1794, whether the said sum of 2000*l.* was or was not due from the plaintiff to Shephard when the defendants advanced the said 2000*l.* upon the said securities, or whether the same was or was not afterwards satisfied or paid to Shephard by the plaintiff, or by reason of monies received by Shephard upon his account; and that they ought not to be restrained from proceeding by ejectment to recover possession.

The assignees of Shephard by their answer submitted to account.

The cause was heard upon bill and answer. When it was first opened, the Lord Chancellor directed it to stand over, that it might be formally argued; considering the point to be new, and of great importance, as it might affect the general credit of mortgages.

LORD CHANCELLOR [LOUGHBOROUGH]: In this cause the question was only whether the assignee of a mortgage had a right to be paid according to the sum that appeared due upon the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee. The circumstances had nothing in them so particular as to vary at all the general question. Matthews had created a mortgage, upon which Shephard had advanced money; and, Shephard being his attorney, the purpose of creating the mortgage was that money might be raised for the use of Matthews. Shephard ought not to have made any use of the mortgage but for the purpose for which it was created, viz.,

deft' counter-tion.

Summary

fact.

Held as signed of wife only get it of intell assignor.

New Ed. y Case be- gives here.

to raise money for Matthews; but he thought fit to assign the mortgage without the privity of the mortgagor, and the assignee now claims to hold the mortgage to the full extent of the sum appearing due upon the face of the deed.

When the cause came on before me, a case was referred to in which, it was supposed, Lord Thurlow had entertained an idea, but not decided, that a mortgagor having permitted the mortgage deed without any indorsement upon it to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage to the full extent of it against the mortgagor who permitted the mortgagee to deal with and to make a security upon it. It was also supposed that in practice there is no occasion to make the mortgagor a party; and in some cases it may not be possible to make him a party to the assignment; and that to hold that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could, and I think I have got the best. The result is that persons most conversant in conveyancing hold it extremely unfit and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due; that in fact it does happen that assignments of mortgages are taken without calling upon the mortgagor; but that the most usual case where that occurs is where it is the best security that can be got for a debt not otherwise well secured, and it is not in the course of transferring mortgages, but of raising money upon such securities; but no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party and being satisfied that the money was really due.

With regard to the case that was quoted, I believe that from the circumstances of the first order that was made, there might have been some doubt expressed at the time upon the point. The bill was filed by Lunn and others, assignees of Lodge, a bankrupt, against St. John. According to the state of the case I have had, Lodge made a mortgage to Pitman, who, being indebted to St. John, made an assignment to him for a sum less in fact than the sum due upon the mortgage. It was stamped and signed, but not sealed. Lodge and Pitman both became bankrupts. The bill was filed, insisting that nothing was due upon the account between their estates. The defendant St. John insisted that the plaintiffs must redeem him, who was a fair mortgagee, and had nothing to do with the account. Lord Thurlow in the decree gave special directions to the Master to inquire what was due at the time of the

mortgage, what was due at the time of the assignment, and what remained due—saving the point, how far St. John would be affected, till after the report upon that special direction. It came on upon the report before the Lords Commissioners, the Master having reported that Pitman was indebted to Lodge in 7000*l*. By the order made upon that report it was declared that the assignments, dated the 13th of February, 1755, and May, 1776, made by Pitman to the defendants St. John and Muilman are to be deemed null and void against the estate of Lodge, the bankrupt, and are to be delivered up by the defendants St. John and Muilman to the plaintiff, the surviving assignee of Lodge, to be cancelled; that all deeds and writings relating to the estate of Lodge be delivered up upon oath; and that the defendants join in reconveying the estate. The final result therefore was that, nothing being due upon the original mortgage, the two assignees of it took no benefit by the assignments. Therefore that case is a direct authority in favor of Matthews.

The cases decided, and long decided, in Precedents in Chancery and Vernon, seem also to bear very much upon it; where it was made a question, now perfectly settled, that, as between the mortgagee and the persons claiming under him, without the privity of the mortgagor they cannot add to what is due, settle the account, or turn interest into principal. The mortgagee having been in possession, the assignee is bound to settle the account of the rents and profits received by the mortgagee, from whom he takes the assignment. Considering the general principles upon which this Court acts with regard to mortgages, I have no difficulty in deciding the point. It is true there is a legal estate or term; but it must be apparent upon the face of the title that it is not an absolute conveyance of the term or legal estate, but as a security for a debt; and the real transaction is an assignment of a debt from A. to B.—that debt collaterally secured by a charge upon a real estate. The debt therefore is the principal thing; and it is obvious that if an action was brought upon the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment.

Therefore the plaintiff must be at liberty to redeem upon payment of what the Master shall find due upon the original mortgage from him to Shephard. I will direct the account exactly in the same way as Lord Thurlow made the direction in the case I have

an O.K.

?

? O.K.



cited: an account of what was due at the time of the mortgage, what was due at the time of the assignment, and what remains due.¹

The account in that case was, I apprehend, changed by transactions subsequent to the mortgage; however, I do not know that.

omit

PARKER v. CLARKE.

CHANCERY—THE ROLLS COURT, 1861.

(30 Beav. 54.)

William Gray Cruchley was, under the will of his father, entitled to a share of his real and personal estate.

By an indenture dated the 5th of July, 1849, William George Cruchley conveyed and assigned to Mr. Thomas all his estate and interest under the will for securing 95l. This mortgage was executed while William George Cruchley was in prison for debt, and the Court, after weighing the evidence, came to the conclusion that it was given without consideration and under a promise to release the mortgagor from prison, which was never performed.

On the 12th July, 1849, Thomas transferred this mortgage to the defendant Clarke, who had notice of the circumstances under which it had been obtained, and in July, 1860, Clarke deposited the mortgage and transfer with Phillips to secure the payment of moneys due and to become due. Phillips had no notice of the circumstances under which the mortgage had been obtained.

This bill was filed against Clarke and Phillips for a declaration that the mortgage deed was void, and for an order for its delivery up to be cancelled.

Mr. Follett and Mr. Ellis, for the plaintiff, contended that the deed was void, and that Phillips, having a mere equitable title to what might be due on the mortgage, could only claim such interest as Clarke was entitled to.

Mr. Bagshawe and Mr. J. Napier Higgins, for Clarke, contended

"It is settled that, if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee; and I think that rightly settled. I would not say so, but that I know Lord Kenyon entertained a doubt of Lord Rosslyn's decision upon that subject."—Per Lord Eldon in *Chambers v. Goldwin*, 9 Ves. 254, 264 (1804). The reference is to the decision of Lord Loughborough (subsequently created Lord Rosslyn) in the principal case.

Mtge given, Considered for it never given (releasing mtg from jail). Mtg assigned to Clarke, Clarke default with Phillips as Col. Sec. Clarke has notice of his defect Phillips is held for Mtg. Mtg. & Co. called. Clarke goes no more than what he had & Phillips, the mortgage could get a worse title than Clarke has.



that the evidence failed in shewing that no consideration had been given for the mortgage.

Mr. Lloyd and Mr. Locock Webb, for Phillips, argued that he was a purchaser for valuable consideration without notice, and that he was entitled to hold the deed until he had been paid what was due to him; that the mortgagor, having enabled Clarke to obtain money on the faith of this deed, could not set it aside without paying what had been actually advanced on it by Phillips.

The following authorities were cited in the course of the argument: Powell on Mortgages, Vol. 2, p. 589 (6th edit.); Walley v. Walley, 1 Vern. 484; The Earl of Aldborough v. Frye, West's Rep. 221; 7 Cl. & Fin. 436; George v. Milbanke, 9 Ves. 190. The cases of Reynell v. Sprye, 8 Hare, 222; 1 De G., M. & G. 660; and Cockell v. Taylor, 15 Beav. 103, were also referred to.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]:

I am of opinion in this case, that the deed must be delivered up. The first question to be considered is whether the deed is not void, being a mortgage deed for which no consideration was given, and having been obtained from a person in prison, under promises to release him, which were never realized.

This, I am of opinion, is the state of the case:—[His Honor here examined the evidence and proceeded:]—The result is that in my opinion it is proved that no consideration was given for the mortgage deed and, as against Clarke, it must be delivered up to be cancelled.

With respect to Phillips, I am of opinion he could only take what Clarke could give him, and that he cannot stand in a better situation than Clarke himself. Phillips must therefore deliver up the deeds, and his only remedy will be against Clarke.

omit
Commissioners had power to levy rates, borrow money or pledge rates for loans, & make improvements, not to deal with any member of Commission. Bought bricks from a member & pledged rates to pay for them. Apparently
WEBB v. COMMISSIONERS OF HERNE BAY. note debentures were
COURT OF QUEEN'S BENCH, 1870. for loans. Got into hands
(L. R. 5 Q. B. 642.)¹ B.F.P. Held he can re-
Cover on them. Commis-

An action commenced by writ, with an indorsement that the plaintiffs intended to claim a writ of mandamus to command the defendants to apply all the money raised or to be raised under or by virtue of 3 and 4 Wm. IV., c. 55. in the manner prescribed by

¹A short statement of facts is substituted for that given in the report.

Commissioners are set off to deny their power to levy rates for materials & also set off to set illegality if it was such.

s. 123 of that act. At the trial a verdict was taken for the plaintiffs, subject to a case.

Fact.
The defendants are a body corporate, incorporated by the said act for the purpose of local improvement, and empowered by the act to levy rates and to borrow money at interest, mortgaging the rates and issuing debentures for that purpose. The form of the debentures was prescribed by the act, which also made them capable of assignment in the form provided. Further, the commissioners were declared incapable of taking or entering into any bargain or contract under the act, and a penalty was prescribed for so doing. In 1835 the defendants bought large quantities of bricks of David Halket, one of the commissioners, who was a brick and tile manufacturer, and in payment therefor issued to him certain mortgage securities of £100 each, in the form prescribed by the act, and which were duly registered. The mortgages were in the form of grants of the rates levied by the commissioners to David Halket, his executors, administrators and assigns. No money was actually paid by Halket to the commissioners. The mortgages so granted to him were duly transferred to the testator of the plaintiffs, who had no notice of the circumstances under which they were issued. No part of the principal or interest of the mortgage debt has ever been paid. Section 123 of the act above referred to authorizes the commissioners to apply the money to be raised by them in discharging such interest and principal.

The questions for the opinion of the Court were:—

1st. Whether the plaintiffs are entitled to recover in this action any and, if so, what sum as damages in respect of arrears of interest on the six mortgages or any of them.

2nd. Whether the plaintiffs are entitled to a writ of mandamus in the form endorsed on the writ.

Holds Com-missioners estopped to set up any defect if any.
COCKBURN, C. J. By 3 & 4 Wm. 4 c. cv. a local Act, which provided for the paving, cleansing, lighting, and improving the town of Herne Bay, certain commissioners are appointed: and by s. 119 the commissioners have power to mortgage the rates which they are empowered to levy under the Act for the purposes which they as such commissioners are to execute; and the present plaintiffs sue upon certain debentures which were issued by the commissioners under that section; and they also claim a writ of mandamus requiring the commissioners to apply the money raised or to be raised under the Act to the purposes of the Act. In order to construct certain buildings necessary for the purposes of the Act, the commissioners required a quantity of bricks, and Halket, to whom the debentures were originally given, supplied the bricks in question, and instead of being paid in cash he was paid by deben-

tures. It is said that the transaction in respect of which the debentures were issued was illegal under s. 10 of the local Act, inasmuch as by that section any person acting as a commissioner is prohibited from entering into any contract with the commissioners; and that, therefore, the sale of the bricks by Halket to the commissioners, he himself being a commissioner, was an illegal transaction. It may be that the effect of this section was to render the transaction illegal as regards the contract between the commissioners and Halket. But as the commissioners have had the benefit of the contract, the question would be whether or not Halket could recover in indebitatus assumpsit for goods sold. I do not think it necessary to decide that question. I proceed entirely upon the ground that the defendants are estopped from disputing the validity of the debentures in question. It is true the commissioners have power under s. 119 only to borrow money, and it may be that under the power to borrow they were not authorized to give debentures for the purpose of paying for goods and materials supplied to them for the purposes of the town. But the commissioners gave to Halket, in respect of the bricks which they got from him, debentures, in the form prescribed by the Act, which purport upon the face of them to be debentures given for money advanced to them. Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commissioner, and therefore prohibited from entering into such a contract with the commissioners, or as to the fact of their being debentures given for goods supplied instead of for money advanced. Under those circumstances, it is clear the principle laid down in *Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cooke*, 2 Ex. 654, is immediately applicable to the present case, as well also as the doctrine laid down in the judgment of this Court in the case to which my Brother Blackburn referred,¹ *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584. In that case a railway company had been deceived into registering shares and granting certificates of registration, whereby innocent persons were induced to purchase those shares under the belief that the vendors were registered shareholders, and it was held that the company were estopped by their own act from denying the right of the innocent transferees of the shares to be registered as shareholders. I think the principle of all those cases is strictly

¹Upon the argument, the report of which is omitted here.

applicable to this. How is a person who takes for a valuable consideration such debentures as these upon an assignment, regular in form, to know under what circumstances they were issued? The commissioners might be wrong in allowing these debentures to go forth, knowing that they might come into the hands of an innocent holder for value, but according to the principle of the cases cited, they are estopped from alleging that the debentures were illegally issued. The debentures on their face import a legal consideration, namely, the advance of money. The defendants issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal? I think on the sound principle of the doctrine laid down in the cases which I have cited, such a defence cannot be made available.

I confess I cannot see any difficulty in the other points made, namely, that the first purpose to which moneys raised by the commissioners is to be applied is that of paying the costs and charges of getting the Act. It is true these expenses have been met partly by debentures which are still unpaid; but that is no answer to an application for payment on the part of the present holder of these debentures.

It was further contended that the mandamus claimed by the plaintiffs will not lie, because it is possible that rates may not hereafter be raised, and the form of the mandamus ought to have been to levy rates out of which to pay the interest on the debentures; but it appears that up to the present time rates have from time to time been levied, and if the rates be levied, inasmuch as the commissioners are bound under the Act to pay interest upon the debentures which they have issued, the mandamus will operate and compel payment of the amounts claimed in this action. If, owing to the form which this mandamus assumes, the commissioners desist from levying the rates, the consequence will be that a further mandamus will be required, commanding the commissioners to levy a rate for the express purpose of paying the interest; but I think we are fairly entitled to presume that that which has been done, and which is a part of the duty of the commissioners to do under the provisions of the Act, will continue to be done.

BLACKBURN, J. I am of the same opinion. The plaintiffs claim in the present action a writ of mandamus commanding the defendants to pay any money raised or to be raised under and by virtue of 3 & 4 Wm., 4 c. cv., in the manner prescribed by s. 123 of that Act. That is the duty they require the commissioners to fulfil,

*Estoppel
also.*

stating that the plaintiffs are personally interested in the fulfilment of it. When we turn to s. 123 we find it requires the defendants to apply so much money as may be raised under the Act, in the first place in defraying its expenses, in the next place in paying the interest upon the bonds and debentures, and afterwards in paying for the works and purposes of the Act. The plaintiffs are personally interested in having the money applied as provided by the Act; and if the commissioners have departed from their duty of properly applying the money and causing the interest to be paid, the plaintiffs are entitled to a mandamus.

It is said that the commissioners will not raise any money in future; and if the plaintiffs had anticipated that, they might have come to the Court for a mandamus not only to command the commissioners to apply the money, but to levy rates to raise it; but I see no objection to granting a mandamus in the limited form in which it is asked for, though probably the plaintiffs may be entitled to demand another in a different form at some future time.

The next question is, are the plaintiffs personally interested in the fulfilment of the duty created by the statute; or, in other words, are they the holders of the six debentures in such a manner as to have the right to have them enforced against the defendants? By s. 119 the commissioners are authorized to borrow and take up at interest any sum of money upon the credit of the rates authorized to be raised under the Act, but so that there shall not be owing upon the securities at any one time more than 5000*l.*, and *toties quoties*, to pay off and renew the loans, and the form of mortgage is given in the Act. And that form commences with the statement on the face of it that the commissioners have borrowed a particular sum of money of a particular individual upon the credit of the rates. Section 120 provides the mode in which a person who has the mortgage may assign and transfer it; s. 121 enacts that there shall be no preference by reason of priority of the date of the mortgages. S. 122 requires that a book shall be provided in which copies of the mortgages, securities, and transfers shall be entered and registered, to be open to inspection; and then it enacts that, after such entry, every such transfer "shall entitle the person to whom the same shall be made, and his executors, administrators, and assigns to the benefit of the security thereby made or transferred." So that the effect of the statute is this, the commissioners may borrow money and give a form of mortgage which, on the face of it, states expressly that they have borrowed a particular sum of money; the mortgage may be transferred, and when it is entered in the register which they are bound to keep, the transferee shall have the benefit of that

security. The plaintiff's testator has *bonâ fide* taken a transfer of six mortgages, on the face of which it is expressly stated that the commissioners have borrowed from Halket (who is the person named in the mortgage) six sums of 100*l.* each. The commissioners knew from the Act that these mortgages when so granted might be transferred to a person on the faith of the matters stated in them. They knew from the Act that such transfer might be made and might be entered on the register, and, when registered, the security might be transferred. That being the state of things, the plaintiffs, who are the *bonâ fide* holders of the mortgages, demand the payment of the interest on the mortgages, and the commissioners deny their liability to pay on the ground that the matters stated on the face of the mortgages are incorrect and untrue. The law laid down in *Freeman v. Cooke*, 6 A. & E. 469, and *In re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 583, is very clear, that when a person has made a statement similar to the present, he is precluded as against another person who has *bonâ fide* acted upon it from denying the truth of the statement, and consequently I hold that the commissioners, who have stated on the face of the mortgages that Halket had advanced and lent the money on the credit and for the purposes of the commissioners, are precluded as against his *bonâ fide* transferees from denying the truth of that statement.

Our decision on this point disposes of the case. I do not think it necessary to enter into the other questions. One is that, inasmuch as the mortgages were given in payment of a debt for bricks sold, they could not have been given for money borrowed. My own impression is—and it is a very strong impression—that the legal effect of such a transaction is the same as if the commissioners had borrowed the cash and then applied it in payment of the debt for bricks; and as if the creditor had lent the money upon the security of the debenture, and then received back the identical coin in payment of his own debt for the bricks. I see no objection to this view of the transaction, which I incline to think valid.

A further objection was raised. It was founded on s. 10 of the local Act, which provides that where any commissioner is either directly or indirectly interested in any bargain or contract, he shall be disqualified, and further that no person during the time he shall be such commissioner shall be capable of taking or entering into any such bargain or contract, nor shall any commissioner act in any matter in which he shall be personally interested. And s. 11 imposes a penalty of 50*l.* upon every commissioner who acts being disqualified. It was contended that Halket, who had furnished the bricks to the commissioners, being himself a commissioner at

the time, the contract was illegal and void. It is not necessary to decide this question, and I wish to guard myself from being thought to give any judgment on that point.

MELLOR, J. I wish to rest my judgment in this case on the general doctrine of estoppel. I cannot distinguish it in principle from *In re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 583, which is founded on the very salutary decision of *Freeman v. Cooke*, 2 Ex. 654. The local Act contemplates the borrowing of the money for the purposes of the works of the town of Herne Bay, and it gives a form of mortgage upon which the money is to be borrowed. The form states that in consideration of the sum of money advanced and lent upon the credit of the rates for the purposes of the Act, and paid to the treasurer of the commissioners, they thereby grant and assign a due proportion of the rates. That was the form of the mortgage in this case. In addition to that the Act, which enables the commissioners to raise money upon mortgage in that form, also enables the holder to assign the mortgages. He may, by a writing under his hand, transfer the same to any person, and it gives the form of endorsement by which the transfer may be made. There is a provision for registering the transfer, and when that is completed any person who is an innocent holder has a complete title. The commissioners, who have borrowed the money and enabled the transfer of the mortgage to be effected, cannot afterwards deny their liability on the ground that the mortgage was given, not for money lent, but for some purpose which they allege to be illegal. On that ground I hold the plaintiffs are entitled to the remedy they seek.

LUSH, J. I also think it is unnecessary to express any opinion on the question whether, if this action had been brought by the original mortgagee, the commissioners could have set up any defence against the claim; because the defence, namely, his incapacity to contract at the time by reason of his filling the office of commissioner, cannot be set up against the plaintiffs, his transferees. The mortgage security itself makes the money payable to Halket or his assigns. The Act of Parliament says that any person entitled to any security may transfer it in the terms specified in the Act, and further that when that transfer has been made and registered in the book of the commissioners—and this has been registered—every such transfer shall entitle the person to whom the same shall be made to the benefit of the security thereby transferred. Now the effect of those sections, I think, is to make these mortgages negotiable securities and to attach to them the incidents of negotiable securities; one of which is that an innocent holder for value, as it is admitted the plaintiffs are, acquires a title of his own,

Say act
made se-
curities
negotiable.

{ unaffected by any infirmity to which the title of his assignor might have been subject. Upon that ground, I think the plaintiffs are entitled to judgment.

Then as to the alleged defect in the prayer of the mandamus, I think it is quite enough to say that the complaint against the commissioners is not that they do not make rates, but that they apply the proceeds in a different way than that directed by the Act of Parliament. It is to be assumed they will go on making the rates as they have done. The mandamus is directed to the misappropriation. If it turns out to be needful to compel them to do what they have hitherto done—to make the rates—then a mandamus may be applied for for that purpose.

Judgment for the plaintiffs.

Help gave a note for 250£ on certain equitable interests they had in some annu - BICKERTON v. WALKER.

ities. On note SUPREME COURT OF JUDICATURE—CHANCERY DIVISION, 1885.

was receipt for the 250£. (L. R. 31 Ch. D. 151.)

Mtges assigned to a bona fide person. Elizabeth Goulston, who died in 1862, bequeathed to trustees a sum of £1000 upon trust to invest it and pay the income to Elizabeth Bickerton, the wife of John Bickerton, for life, and after her death upon trust for such children of hers as should be living at her decease, and being sons should attain twenty-one, or being daughters should attain that age or marry, and for such issue of any children dying in Mrs. Bickerton's lifetime as should be living at Mrs. Bickerton's death, such children to take their parent's share. The legacy was invested in £975 New £3 per Cent. Annuities.

receipt carelessly given from setting up facts is the bona fide assignee for value In 1879 Mrs. Bickerton was a widow with three children, all of whom had attained twenty-one. Emily Bickerton, spinster (hereinafter called Miss Bickerton), was one of them.

Says all rights are equitable as legal title in trustees that of two Equit. Claimants one direct to later payments by vulgar & like, but that he may rely on receipt on back of notes as to what orig. transaction was, that he is not at fault while help are in carelessly giving a false receipt. On the 10th of February, 1879, Mrs. and Miss Bickerton executed a mortgage deed by which, in consideration of the sum of £250 therein expressed to be paid to them by Ebenezer Bates, "the receipt and payment of which said sum of £250 they, the said E. Bickerton and E. Bickerton the younger, do hereby acknowledge, and from the same and every part thereof do hereby release the said E. Bates, his executors, administrators, and assigns," they jointly and severally covenanted with Bates for the

(1) Gentilly recognized that utgor may Estop himself. Last Case was one where Estopped of mem. corp. (utgor) to deny recitals on instruments issued by it came in. Found no other case just like ours.

(2) Has been some talk as if issuing an apparently valid utgor & bond Estopped utgor to set up lack of consid. or like. But no such rule really established.

(3) Question of fact in our case whether really Estopped. Did Hunter really rely on the receipt? Was it reasonable for him to do so? Was pltf negligent in signing receipt considering the formal nature of instrument & pltfs' probable ignorance of just what they were doing? Perhaps they were to blame somewhat, but should not dept have known of formal nature of receipt, likelihood of its being signed w/o reading, and have it inquired further, especially as utgors were women?

payment to him of £250 with interest at £7 per cent. on the 10th of August then next. Mrs. Bickerton then assigned to Bates her life interest in the £975 stock and a policy of assurance for £100 effected by her on her own life, and Miss Bickerton assigned to Bates her reversionary share in the £975 stock and a policy of assurance for £300 effected by her on her own life, subject, as regards all the interests assigned, to redemption on payment of £250 with interest at £7 per cent. on the 10th of August then next. Indorsed on the deed was a receipt in the usual form, signed by Mrs. and Miss Bickerton, acknowledging the receipt of £250.

Astley acted as solicitor for both parties in this transaction, and the deed was left in his hands. On the 11th of March, 1879, the mortgage was transferred by Bates to Hunter, who acted by his own solicitor, Walker, and gave full value for the mortgage as a mortgage for £250, without making any inquiry from the mortgagors.

This action was commenced by Mrs. and Miss Bickerton against Walker, Bates, Astley, and Hunter, alleging that the plaintiffs had only received sums amounting to £91 17s. 6d. instead of £250, that Bates was the nominee and trustee of and for Walker, and that Bates and Astley acted under his directions, and that Hunter had notice of the above facts when he took his transfer. The plaintiffs asked that the mortgage might be cancelled, they offering to pay the sum really advanced and the interest thereon, and that the transfer might be declared void against the plaintiffs, or in the alternative that the mortgage might stand as a security for what had been really advanced and interest, and that the plaintiffs might have redemption on that footing, or as another alternative, that they might have redemption on the mortgage deed as it stood.

It was clearly shewn that Walker was not interested in the mortgage, and had simply acted as Hunter's solicitor, and no ground was shewn for affecting either of them with notice that the plaintiffs had not received the whole £250. Vice-Chancellor Bacon considered the plaintiff's case not to be proved, and gave a judgment dismissing the action with costs as against Walker, and dismissing it with costs as against Hunter, except so far as it sought the ordinary judgment for redemption. The usual order in a redemption suit was made against Hunter, with a direction that the account was to be taken on the footing of £250 having been advanced to the plaintiffs.

The plaintiffs appealed, and the appeal was heard on the 16th and 17th of November, 1885. The evidence as to the circumstances under which the mortgage was executed was gone into, and

in the opinion of the Court of Appeal was such as would, if there had been no transfer, have made it proper to decree redemption on payment only of what should be shewn to have been actually advanced. Astley was abroad and Bates did not appear, so the material question was whether a decree of that nature could be made against Hunter.

Seward Brice, for the appellants:—I contend that a mortgage can only be enforced by a transferee to the same extent as it might be enforced by the original mortgagee. (*Parker v. Clarke*, 30 Beav. 54.) The transferee takes subject to the equities which affect the original mortgagee. (*Norrish v. Marshall*, 5 Madd. 475.)

[FRY, L. J.:—That case only deals with subsequent transactions between the mortgagor and mortgagee, the mortgagor not knowing of the transfer.]

The principle is illustrated by *Matthews v. Wallwyn*, 4 Ves. 118, which decides that a transferee takes subject to the account between the mortgagor and mortgagee. The principal thing in the transaction is the assignment of the debt, as said by Lord Eldon in that case. The debt, until the recent change in the law, was only assignable in equity; the assignment is subject therefore to equitable principles, and passes nothing but what is justly due on the instrument. *Williams v. Sorrell*, 4 Ves. 389, follows the same principle. The true view is that the transferee is bound by all equities affecting the mortgage transaction, not merely by the state of the account. *Smith v. Parkes*, 16 Beav. 115, shews that the assignee of a debt takes subject to all equities.

[BOWEN, L. J.:—Are you not estopped by the deed and the receipt upon it from saying that the whole sum was not advanced? (*Goodwin v. Roberts*, 1 App. Cas. 476.)]

That was the case of a document which by custom is a negotiable instrument. The present is the case of a mortgage which is not given with a view of its passing from hand to hand.

[BOWEN, L. J., referred to *In re Agra and Masterman's Bank*, L. R. 2 Ch. 391.]

The present case is more like *In re Natal Investment Company*, L. R. 3 Ch. 355, in which the *Agra Bank Case* was referred to, and which is a strong authority in my favour. There is no estoppel from a recital in a security unless it is shewn that the recital is intended to be shewn to third parties to induce them to act upon it; and the fact that no prudent person takes a transfer of a mortgage without an inquiry from the mortgagor, shews that the recital is not intended to be acted on. (*Rolt v. White*, 31 Beav. 520, and *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294, support my contention. I say then that the mortgage ought to be cut



down as against Hunter. No prudent transferee of a mortgage ever takes his transfer without inquiring from the mortgagor, and it is negligence to do so. The case is quite different from that of an absolute sale, because there an inquiry would not be made of the original vendor unless there was something to raise suspicion.

Millar, Q. C., and Laing, for Walker and Hunter:—As against Walker there is no case: he ought never to have been made a party, and the dismissal as against him must stand. As regards Hunter, assuming that the whole £250 was not advanced, we say that he is not affected by that. If a person takes a transfer of a mortgage without inquiring from the mortgagor, he does so at his own risk as regards the state of the account, but the mortgagor is estopped from saying that any statement made by himself is untrue. The transferee has a right to act on any such statement. Everybody knows that the sum due on a mortgage may have been reduced by part payment, and if a transferee makes no inquiry from the mortgagor the mortgagor gets the benefit of previous part payments as against him. By saying that a less sum than the original principal is now due he is not contradicting anything in the mortgage deed, but here the mortgagor is alleging as against a *bonâ fide* purchaser without notice that the statement in the mortgage deed as to the sum advanced is not true. That cannot be allowed. *Hunter v. Walters*, L. R. 7 Ch. 75; *West v. Jones*, 1 Sim (N. S.) 205; *Rice v. Rice*, 2 Drew. 73. In *Shropshire Union Railways and Canal Company v. The Queen*, L. R. 7 H. L. 496, 509, Lord Cairns refers to *Rice v. Rice* with approbation. The principle is not confined to cases where A. makes a written representation to B. with the intention that it shall be shewn to C., for both Lord Cairns in the last-mentioned case, and Lord Hatherley in *Hunter v. Walters*, lay it down broadly that a receipt for money estops the party giving it, as between him and a third person who has acted on the faith of it.

[FRY, L. J.:—An assignment of a chose in action is subject to all equities. Do you say that the receipt is an assertion that there are no such equities?]

I say that at all events it makes the equities unequal; a person who has given a receipt stating that he has received money, and then disputes its truth, cannot have as good an equity as a person who acted on the faith of the receipt.

[BOWEN, L. J.:—What do you say to *In Re Natal Investment Company*, L. R. 3 Ch. 355?]

In that case there was no receipt, and no one buying a debenture in the market buys it on the faith of the whole of the money having been advanced, it being notorious that debentures are often

issued below par. In none of the cases cited against us was there any indorsed receipt. *White v. Wakefield*, 7 Sim. 401, is strong in our favour.

The judgment of the Court (Sir James Hannen, and Bowen and Fry, L. JJ.) was delivered by

FRY, L. J.:—In the year 1879 a sum of £975 New 3 per Cent. Annuities was standing in the name of a trustee under the will of a Mrs. Goulston, upon trust for the plaintiff, Mrs. Bickerton, for life, with remainder in equal shares to her children living at her death and the issue of children then deceased. She had three children, of whom the plaintiff, Miss Bickerton, is one.

By an indenture bearing date the 10th of February, 1879, the plaintiffs assigned to the defendant Bates their interests in these annuities to secure a sum of £250 and interest at 7 per cent. payable on the 10th of August, 1879. On this mortgage there was indorsed the usual receipt for the sum of £250, which was signed by both plaintiffs.

The plaintiffs allege that sums amounting to £91 17s. 6d., and no more, were paid to them in respect of the £250; and though the evidence adduced by the plaintiffs is far from satisfactory, we are of opinion that as against the defendant Bates the plaintiffs have established by evidence a case for reducing the mortgage; or, in other words, that as against Bates the plaintiffs would be entitled to a declaration of their right to redeem on payment of what should be found to have been actually advanced on the mortgage, with interest.

On the 11th of March, 1879, the defendant Bates assigned this mortgage security to the defendant Hunter, and it is not disputed by the plaintiffs but that this defendant has shewn that he paid the full consideration of £250 for the assignment, and that he took the assignment without actual notice of any equity subsisting between the plaintiffs and Bates except the equity of redemption according to the form of the mortgage deed.

The plaintiffs, however, contend that inasmuch as the assignment of their interests in the legacy was an assignment of a chose in action, the defendant Hunter is now liable to all the equities which the plaintiffs had at the date of the assignment against his assignor, Bates. This the defendant Hunter denies.

As the legal interest in the legacy was and is vested in the trustee of Mrs. Goulston's will, it is evident that the interests both of the plaintiffs and of the defendant Hunter are equitable interests only, and the real question for our decision is, what are the relative merits of these persons having adverse equitable interests? If the merits of the one are greater than those of the other, the

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must stand*



Court will give the priority to the greater merits; if and only if the merits are equal, it will give the priority of right to the one who is prior in point of time.

The plaintiffs executed a deed which recited that they had received the whole sum of £250, and which stipulated that their right of redemption should be on payment of the sum of £250 and interest, they signed a receipt on the back of the deed stating that they had in fact received this sum of £250, and they permitted Bates, or Astley, who was acting with or for him, to have possession of the deed containing these false statements. That the plaintiffs were in a moral point of view excusable for these acts is beyond doubt, and that they were deceived by those whom they trusted, and as such are objects of sympathy, is equally clear. But they were inexact and careless, and placed in the hands of Bates or Astley the means of deceiving other persons, and these are in the view of a Court of Equity demerits.

Was Hunter guilty of negligence or want of care in his part of the transaction? He must, on the evidence before us, be taken to have advanced his money on the faith of the production of the mortgage deed and receipt signed by the plaintiffs; and if the assignment by the plaintiffs had been, not a mortgage but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter in not inquiring of the plaintiffs as to their rights or claims. But it has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance, because it is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is however, in our opinion, to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor. But in the present case the assignment was made very soon after the execution of the mortgage, and before the time for payment had arrived; so that, whilst it was possible, it was not probable, that any payment would have been made either of principal or interest; and we are of opinion that if an assign is willing to take the risk of any payment having been made after the date of the mortgage he is not guilty of carelessness or negligence if, in the absence of any circumstances to

arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor.

The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand.

Our decision follows, as will be obvious to those who are familiar with this branch of law, the general lines laid down by Kindersley, V. C., in *Rice v. Rice*, 2 Drew. 73. For the solution of the particular question which distinguishes this case from that, viz., whether there is for this purpose any difference between a mortgage and an absolute conveyance, we have not been aided by any authority cited to us at the bar.

For the reasons already given we dismiss this appeal with costs.

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OLDS v. CUMMINGS.

SUPREME COURT OF ILLINOIS, 1863.

(31 Ill. 188.)

WRIT OF ERROR to the Circuit Court of Bureau county; the Hon. M. E. Hollister, Judge, presiding.

This was a bill in chancery exhibited in the Circuit Court by Justin H. Olds against Preston Cummings, Cynthia Cummings, his wife, and others, asking the foreclosure of a mortgage.

It appears that on the 21st of November, 1857, Preston Cum-

*assigner of mortgage
tho' a bona fide
purchaser takes
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Mortgage ac-
cused re-
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tings executed to the order of Charles L. Kelsey his two certain promissory notes, both payable some months thereafter. On the same day on which the notes were executed, Preston Cummings, with his wife, Cynthia Cummings, to secure the payment of these notes, executed and delivered to Kelsey a mortgage upon real estate. The notes were assigned to Olds, the complainant, by Kelsey, the payee, as the bill alleges, before their maturity. Olds, the assignee sought by this bill to foreclose the mortgage mentioned. Cummings, in his answer, admits the execution of the notes and mortgage described in the bill, but interposes the defense of usury. It is also alleged in the answer, that the assignment of the notes by Kelsey to Olds was made (if at all) long after their maturity; but that, in fact, the matter of the assignment was only colorable, not made *bona fide* for a valuable consideration, and only to prevent the defendants setting up the defense before mentioned.

The record contains voluminous proofs upon these contested questions of fact; but it is not important to consider the evidence, as the point determined arises out of the facts as insisted upon by the complainant himself. ←

The Circuit Court held that the equity of the case was with the defendant, Preston Cummings, and that there was usury in the notes sued upon, of which usury the complainant had notice, and that he was not entitled to recover the same, but only the principal and interest in the notes, after deducting the usury which they contained: and a decree was rendered accordingly. Olds, the complainant below, then sued out this writ of error, and questions the correctness of that decree, because, among other grounds, the Circuit Court sustained the defense of usury as against him.

MR. CHIEF JUSTICE CATON delivered the opinion of the court: We do not find it necessary to determine the question whether Olds was a *bona fide* purchaser of this mortgage or not. In a case submitted subsequent to this one we have been called upon to examine the question as to how far the rights of the assignee of a mortgage, purchased for a valuable consideration before due, and in ignorance of any equities or defense, shall be affected by such defense; and, as this record also presents the question, and as the conclusion at which we have arrived decides the case, we shall here consider this question and none other.

By the common law choses in action were not assignable. For the convenience of commerce, by the statute of Anne, in England, certain choses in action were made assignable, so as to vest in the assignee the legal title, as promissory notes and bills of exchange. We have a statute, also, making certain choses in action assignable, prescribing a particular mode in which they shall be assigned. Our

statute provides that any promissory note, bond, bill, or other instrument in writing, whereby one person promises to pay to another any sum of money or article of personal property, or sum of money in personal property, shall be assignable by indorsement thereon. Now, the mortgage, to foreclose which this bill was filed, was given to secure the payment of two promissory notes which were assigned by the payee and mortgagee to the complainants. This was, in equity, an assignment of the mortgage. The notes were assignable by the statute, but the mortgage is not, nor is it assignable by the common law. The assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises to the assignee by deed; and upon the question whether this can be done, the authorities are conflicting. Even our statute, authorizing foreclosures of mortgages by *scire facias*, has carefully confined the right to the mortgagee, and does not authorize this to be done by assignees. But it is said that the assignment of the notes carries with it the mortgage, which is but an incident to the principal debt. That is true in equity, and only in equity. Courts of equity will not be confined to legal forms and legal titles, but look beyond these to the substantial, equitable rights of parties, and allow parties who have equitable rights to enforce those rights in their own names, without regard to legal titles. The assignee of a judgment, even, may, in his own name, enforce it in equity. But while courts of equity thus enforce equitable rights, they do it with a scrupulous regard to the equitable rights of others. Thus, if the assignee of a judgment attempt to enforce it in equity, no matter how much he paid for it, or how ignorant he might have been that it had been paid, or that there was other reason why it should not be collected, the court of equity will look into all the circumstances, and will not enforce it in his favor, if it ought not to be enforced in the hands of the assignor. He who buys that which is not assignable at law, relying upon a court of chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor; and the reason is, that equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just of itself.

We have not met with a single case where remedy has been sought in a court of chancery, upon a mortgage, by an assignee, in which every defense has not been allowed which the mortgagor or his representatives could have made against the mortgagee himself, unless there has been an express statute authorizing the assignment of the mortgage itself. There are many cases in which the assignees have been protected against latent equities of third per-

sons, whose rights, or even names, do not appear on the face of the mortgage. And the reason is, that it is the duty of the purchaser of a mortgage to inquire of the mortgagor if there be any reason why it should not be paid; but he should not be required to inquire of the whole world, to see if some one has not a latent equity which might be interfered with by his purchase of the mortgage, as, for instance, a *cestui que trust*.

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We shall refer to a few of the many cases to be met with on this subject. In *Murray v. Lylburn*, 2 J. C. R. 441, the question arose upon a bill to foreclose a mortgage by the assignee, and Chancellor Kent said: "It is a general and well-settled principle, that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor, and not an equity residing in some third person, against the assignor." And for this distinction he assigns the reason above stated. Again, he says, in the same case: "But bonds and mortgages are not the subjects of ordinary commerce." Here is expressed the very essence of the reason of the law. Mortgages are not commercial paper. It is not convenient to pass them from hand to hand, performing the real office of money in commercial transactions, as notes, bills and the like. When one takes an obligation secured by a mortgage, relying upon the mortgage as the security, he must do it deliberately, and take time to inquire if any reason exists why it should not be enforced; while he may take the mere promise to pay the money, as commercial paper, and depend upon the personal security of the parties to it. It may be said to be a distinguishing characteristic of commercial paper, that it relies upon personal security, and is based upon personal credit. It is a part of the credit system, which is said to be the life of commerce, which requires commercial instruments to pass rapidly from hand to hand. Mortgage securities are too cumbersome to answer these ends. The note itself, though secured by a mortgage, is still commercial paper; and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is sought through the medium of the mortgage; when that is the foundation of the suit, and the note is merely used as an incident, to ascertain the amount due on the mortgage, then the courts of equity, to which resort is had, must pause, and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced. He who holds a note, and also a mortgage, holds in fact two instruments for the security of the debt; first, the note with its personal security, which is commercial paper, and, as such, may be enforced in the

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courts of law, with all the rights incident to such paper; and the other, the mortgage, with security on land, which may be enforced in the courts of equity, and is subject to the equities existing between the parties. The right of an assignee to set at defiance a defense which could be made against the assignor is an arbitrary statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity.

In *Westfall v. Jones*, 23 Barb. 10, the Court said: "Does the plaintiff, being a *bona fide* purchaser and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title? It is a well-settled principle that the assignee of a chose in action takes it subject to all the equities which existed against it in the hands of the assignor." In this case the defense to the foreclosure was that the mortgage was given without consideration, and to defraud creditors, and the Court refused to enforce it, but left the assignee, as it would have left the mortgagee, where their contract left them. The case thus decides that the term *equities*, as here used, means *defenses*. The opinion of the Court proceeds: "But I am prepared to hold that the plaintiff has no other or greater rights in relation to this bond and mortgage, and stands in no better position, than Parsons, the mortgagee."

So, in Pennsylvania the same rule was held. In *Mott v. Clark*, 9 State R. 399, the Court said: "He (the assignee) takes it (the mortgage) subject to all the equities of the mortgagor, but not to the latent equities of a third person;" holding the same rule precisely as the case first referred to, as decided by Chancellor Kent; and such also was the case of *Prior v. Wood*, 31 Pa. State R., where the Court protected the assignee of the mortgagee against the latent equities of third persons against the assignor. And this is as far as any Court has gone in the protection of a *bona fide* assignee of a mortgage, when the proceeding was on the mortgage itself, and in the absence of any express statutory provision authorizing the assignment of the mortgage.

We find the law to be, both upon principle and authority, that the assignee of the mortgage in this case took it subject to the defense which the mortgagor had against it in the hands of the assignor. Of the sufficiency of that defense, to the extent admitted by the Circuit Court, no question was made.

The decree must be affirmed.

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- Compare this next case p. 675. All the technical arguments seem to be with this case. Court's argument in the next case mostly feeble. See answers in margin.

But for next case, which is weight of authority, may be urged:

1. That it is a valuable Commercial rule since notes secured by mortgages have rather become articles of Commerce.

2. Court's argument that since mortgage can't secure more than note it shd be ~~limited~~ construed as meaning to secure the debt whatever the debt may be in all cases. If debt gets freed of equities it in effect gets larger. Is something like a mortgage for future advances.

3. Court's arg in *Baily v. Smith* all presupposed that a mortgage is a chose in action & so non-negotiable. Really a mortgage is not a chose in action but creates an interest in property. Why shd not a B.F.P. of that interest, as usual, cut off equities? Answer is that everyone takes it with notice of its nature as security & so must take it merely to secure the debt. True. But then if debt gets freed of equities - why doesn't it still secure it? Ans. is that in hands of mortgagee debt was only a certain amt. & mortgage can't grow larger. But

BAILY v. SMITH.

SUPREME COURT OF OHIO, 1863.

(14 Oh. St. 396.)

Error to the District Court of Lorain county.

The case is stated in the opinion of the court.

RANNEY, J. On the 8th day of October, 1853, the plaintiff gave to the defendant, Charles H. Bolles, his negotiable promissory note for the sum of \$5370, and payable two years after date, with interest. Prior to the 14th of December, in the same year, sundry payments had been made and indorsed thereon, leaving then due the sum of \$2500; and on that day the plaintiff executed and delivered a mortgage upon real estate situated in Lorain county to secure this balance. On the 9th of June, 1856, he filed his amended petition against Bolles, the original payee of the note, Kendall and Lucas, through whose hands the note and mortgage had passed by assignment, and Smith, the then holder, to compel the delivery and cancellation of these instruments; alleging that the note was given for a pretended patent right for a machine which was utterly worthless, whether patented or not; that both the note and mortgage were obtained by fraud, and that every subsequent holder thereof took them with full notice of the fraud and want of consideration.

Smith alone answered the petition, and claimed to have purchased the note and mortgage from Lucas shortly before they fell due, without notice of any fraud or want of consideration, and to be a bona fide holder thereof for value, and entitled to be protected as such.

No bill of exceptions embodying the evidence having been taken upon the trial in the court below, we have only to consider whether the facts found by the court justified the judgment which was rendered. If any state of the evidence, consistent with the pleadings, would justify the findings of fact which the court made, we are bound to presume, in support of the judgment, that such evidence was given. (*Ide v. Churchill, ante, p. 372.*)

The plaintiff obtained the relief demanded in his petition for everything beyond the amount paid by Smith for the note and mortgage, with interest thereon, and for that amount an affirmative judgment for the sale of the mortgaged premises was rendered in favor of Smith, and the plaintiff was ordered to pay the costs of the action.

This judgment was founded upon a finding by the court that

the bona fide purchaser
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notes subject to
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the note was obtained by fraud, and without consideration, of which the intermediate parties, Kendall and Lucas, had notice, and that, as against them and Bolles, the plaintiff was entitled to the relief prayed for in his petition; but the court further find that Smith purchased the note and mortgage from Lucas in September, 1855, and paid therefor \$1250, without knowledge of the fraud and want of consideration existing between the original parties, and is entitled to hold the mortgage for the sum so paid with interest, and to recover thereon for that amount. Passing by, without any remark, the objection that this affirmative judgment in favor of Smith could not have been rendered without a distinct counter-claim interposed by him, and coming at once to the merits of the controversy, it is evident that the judgment can only be supported upon the establishment of the two propositions: first, that upon the facts found by the court, taken in connection with his answer asserting his title, the defendant, Smith, in the sense of the commercial rule, was a bona fide holder of the note, without notice of the equities existing between the original parties; and, second, that the immunity belonging to the note in the hands of such a holder, in virtue of this rule, is extended to the mortgage by which it was originally secured, and equally entitles the holder to recover upon that.

A sum of money due upon the note, from Baily to Smith, is an indispensable predicate upon which to found a judgment upon the mortgage; and as no personal judgment was rendered or attempted, and as both note and mortgage, until they came to the hands of Smith, are found to have been fraudulent and void, it is equally evident that he can sustain his judgment only upon the assumption that the attributes of negotiability belonged to the mortgage as well as the note, and if this can not be done, that the finding upon the note falls with the judgment rendered upon the mortgage. Without such finding, there can be no such judgment; and with the finding, there still can be no judgment, if Smith only succeeded to the rights of his assignor in the mortgage.

1. [The learned judge here considers at length the objections urged by plaintiff's counsel, in opposition to the finding of the court below that Smith was a *bonâ fide* holder of the note and mortgage for value, and comes to the conclusion that there was no error in the finding.]

- 2 The remaining question is one of much importance, and for the first time presented in this court. As it was supposed to be involved in other cases upon our docket, we have given opportunity to counsel in those cases to be heard, and after full argument, we have bestowed upon it very careful attention. Does the fact that a

why doesn't the B.F. P. of legal interest
in property cut such Equities off
the mortgage? Ans. is, they are
Equities vs the debt not vs the
interest in the land. But since
the interest in the land is mea-
sured by the debt an equity vs
the debt is really also an equity
vs the interest in land. Result
is that whenever assignee gets
legal title to interest in land
he shd be free of equities vs
debt. But where he only
gets equit. interest in land he
shd not. In lien states prob-
ably the legal interest in lien
passes on assignment of debt;
in title states ^{then} usually the legal
title is conveyed to assignee.
So it is seldom that assignee
shd not be protected. Better
to avoid distinctions about
legal title passing or not which
business men would hardly
think of as necessary & hold
with *Carpenter v. Longan* that in
all cases assignee is protected
if he gets legal title to debt
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note, obtained by fraud, has passed into the hands of a *bona fide* indorsee, entitle him to enforce a mortgage given to the original holder to secure its payment? Or may the mortgagor still insist upon the fraud, as a defense to an action brought to foreclose it? On the one hand, the question is in no way affected by the further question whether a mortgagee acquires such an interest in the land as to enable his grantee, being also assignee of the note, by deed duly executed, to claim the benefit of the rule which protects *bona fide* purchasers of real estate—there being no claim that any such deed was made? And on the other, we assume, as undoubted, that, whether a written assignment was made or not, the assignee of the note acquired all the rights and interests of the assignor in the mortgage. Very little aid is to be derived, either from adjudged cases or the elementary books, in the solution of the precise question now before us. This is not because the purchase and assignment of mortgages is a new thing. On the contrary, scarcely any business transaction has been more common and familiar, or has oftener engaged the attention of the courts. Nor has the nature of this instrument, and the rights of parties growing out of its assignment, either alone or in connection with a non-negotiable security, escaped attention, or failed to receive very full and accurate illustration. In such case, the universally acknowledged doctrine from the case of *Davies v. Austen*, 1 Ves. 247, to *Bush v. Lathrop*, 22 New York R. 535, has been, that it is to be regarded as a chose in action, and, as expressed by Lord Thurlow, “the purchaser must abide by the case of the person from whom he buys;” but during all that long period, neither in England nor in any of the old states of the Union, does the question seem to have been presented, whether it might not have a different effect upon its assignment when made to secure a negotiable instrument. This may be accounted for, in part, undoubtedly by the general practice of taking a non-negotiable bond with a mortgage; but it can not be doubted that mortgages have many times been taken to secure negotiable bills and notes, fraudulently transferred, and if such a distinction was thought to exist, it seems very singular that the holders should never have made the attempt to avail themselves of such securities. In New York the attempt has been frequently made to confine the principle that the purchaser must abide by the case of the seller, to the original debtor, allowing him to make the same defense against the assignee that he could against the assignor, but protecting the assignee without notice from what have been denominated latent equities, or interests in third persons, not in the apparent chain of title. And this for the very plausible reason that one proposing to purchase such an instrument might in-

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or contra
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quire of the debtor whether he pretended to any defense, and make his answer estop him from afterward asserting any, but that no amount of diligence would enable him to protect himself from such latent equities. But, after some vacillation in judicial opinion, the Court of Appeals, in *Bush v. Lathrop*, repudiated the distinction, and held that the purchaser in such cases must rely upon the good faith of the seller, that he could "take only such title as the seller had and no other," and that if mortgages were "to be further assimilated to commercial paper, the legislature must so provide."

cont

But the direct question arising upon mortgages given to secure negotiable paper has arisen in two of the new states of the west, whose courts are entitled to high respect for their learning and ability, and it has there been held that the quality of negotiability is so far imparted to such mortgages as to make them available in the hands of a bona fide indorser of the paper, without any regard to the equitable rights of the original parties. (*Reeves v. Scully*, Walker's Ch. Rep. 248; *Dutton v. Ives*, 5 Michigan Rep. 515; *Fisher v. Otis*, 3 Chand. Rep. 83; *Martineau v. McCollum*, 4 Id. 153; *Croft v. Bunster*, 9 Wisconsin Rep. 503.) In the first of these cases, decided by the Chancellor of Michigan in 1843, no reasons are assigned or authorities cited; and in *Dutton v. Ives*, decided by the Supreme Court in 1858, the doctrine is again advanced upon the authority of *Reeves v. Scully*, and the two Wisconsin cases, reported in 3 and 4 Chandler. On referring to the first case decided in that state (*Fisher v. Otis*), we find it professedly based on authority, and it serves to show upon what a slender foundation a line of decisions may be made to rest. The court say: "This doctrine is sustained by respectable authorities, and by the reason and sound policy which have long ruled in relation to commercial paper;" and Powell on Mortgages, 908, and note are cited. Mr. Powell certainly did suggest the question whether such a distinction might not be made. His exact position is thus stated by Mr. Coventry in the note: "When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to suggest whether, in such a case, the rule as to the mortgagee's liability would apply." The rule here referred to is that announced by Lord Loughborough in the leading case of *Matthews v. Wallwyn*, 4 Ves. 126, that the assignee of a mortgage takes it subject to all equities which could be asserted against his assignor. Now, it may be fairly assumed that Mr. Powell supposed that such a distinction could be judiciously made; but it must be admitted that he had

*Cases that inter-
fere with
debts.*

then no authority to base it upon, that neither the judicial records of England, nor in any of the old States, furnish any evidence that it has ever been adopted, and that it was first acted upon, nearly half a century after the suggestion was made, by a new State upon another continent. Under such circumstances, it can not be reasonably claimed that we are at liberty to regard it as an established principle, and we can only adopt it when we are convinced that it is correct in principle, and consistent with the analogies of the law.

The reasons for supposing it to be so are well stated in the case of *Croft v. Bunster*, 9 Wis. Rep. 510. The reason assigned, it is said, why the assignee can recover no more in equity than is actually due from the mortgagor to the mortgagee, is, that he could recover no more at law on the bond or covenant, and the reason ceasing as to negotiable securities, the rule also ceases to have application; that the debt is the principal thing, and the mortgage the mere incident, following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. To which may be added the consideration pressed upon our attention in argument, that, if a recovery may be had for the debt, the mortgagor can have no interest in withdrawing the mortgaged property from liability to satisfy it. This last position is easily disposed of. If it were true, it would furnish no authority for changing the legal character and incidents of the mortgage deed, and it is evident that other lien-holders would often have a deep interest in the question. But it is not true as to the mortgagor. The right to dispose of property at the will of the owner, and to pay honest debts instead of those tainted with fraud, are valuable privileges, of which he should not be deprived without a necessity exists; and a decree upon the mortgage would very often deprive him of the benefits of the homestead law, which could not be effected by a judgment upon the fraudulent note. It is very evident also that the wife of the mortgagor, in a large majority of cases, might have a deep interest in the solution of this question. Wholly incapable of becoming a party to any commercial contract whatever, she may nevertheless convey her estate, or release her dower, by way of mortgage for the security of her husband's negotiable paper. If the mortgage is to be deemed negotiable in the hands of an assignee of the paper, we see no escape from the conclusion that the mortgage must be enforced against her, however gross and palpable the fraud may be by which it was obtained.

In a general sense, it may be very well and very correct to speak of a mortgage as an incident to the debt it is created to secure; but the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the creation of the

Reasons for mortgage being neg.

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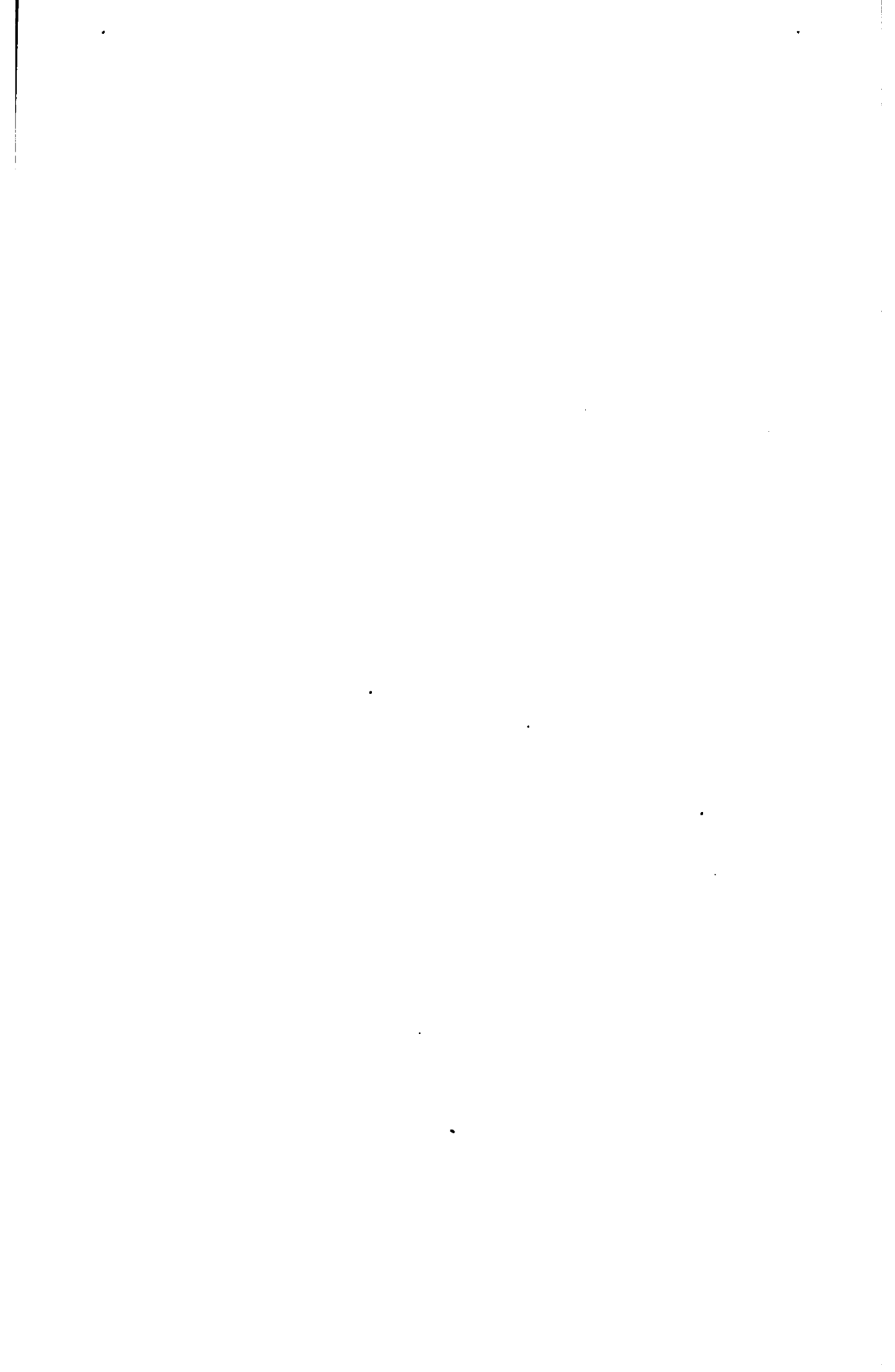
Ans. to 3

Mortg. cred., other lien holder, & wife who join in notes have int.

Ans. to 2

debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage; and is incidental to the debt only in the same sense that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies, according to their own stipulations. At law, a mortgage effects the conveyance of an estate upon condition; but in the view of a court of equity, where alone the rights of an assignee can be enforced, it is a chose in action, having no negotiable quality, and not differing in character from collateral personal agreements, designed to effect the same object. Any of these collateral agreements may be entered into for the purpose of securing a debt, evidenced by a negotiable instrument; and if they are not obtained by fraud, and rest upon a sufficient consideration, in the absence of any agreement to the contrary, they undoubtedly enure in equity to the benefit of any owner of the debt. But the question here is, whether one of these collateral agreements, made to secure a negotiable note, loses its character of a mere chose in action, and has imparted to it the qualities of negotiability, so that upon the transfer of the note it may be enforced, although obtained by fraud? This question has been repeatedly answered, in respect to a class of collateral agreements, much more intimately connected with the negotiable instrument than is the mortgage deed. We refer to guarantees indorsed upon the note itself. Passing by those which have been claimed to be such, but held by the courts to be mere indorsements, or original contracts, with apt words of negotiability incorporated in them, the universal doctrine has been that the legal title does not pass upon the transfer of the note; that they are mere non-negotiable choses in action, and to be treated in every respect as such. (*Lamorieux v. Hewit*, 5 Wend. 307; *McLaren v. Watson's Executors*, 26 Wend. 425; *Miller v. Gaston*, 2 Hill, 188.) In the first of these cases Chief Justice Savage says: "Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note;" and Bronson, J., in the last, in support of the same position, says: "But the guarantee itself is not a negotiable instrument, and can not be transferred to a third person so as to give him a legal title to proceed in his own name against the guarantor. As in the case of other contracts which are not in their own nature assignable, the remedy upon a guarantee is confined to the original parties to the instrument." We have said that these instruments are much more

Guarantee of
note (personal
security) does
not follow
nature of note.
O.K. Ames, B.M.
I 228 note. See
Cases.



intimately connected with the note than is a mortgage deed. This will be apparent when it is remembered that the one ordinarily guarantees the particular instrument specified in it, and does not survive a renewal or other change of the evidence of indebtedness; while the other secures the debt, whatever changes may intervene, until it is paid; and, even a positive statutory bar which precludes a recovery upon the note, it has been held, does not prevent the enforcement of the mortgage. (*Fisher v. Mossman*, 11 Ohio St. Rep. 42.)

In order to sustain the judgment rendered in this case, it is indispensably necessary to affirm—either that the mortgage, when made to secure a negotiable note, contrary to its general nature and qualities, becomes a negotiable instrument or that the transfer of such a note, without the aid of any statute, or of any judicial decision, except those of very recent date, has an effect beyond the note itself, and draws after it, and within, one of the most important incidents of negotiability, a collateral contract having relation to the same debt. A very careful consideration of the whole subject has convinced us that we have no power to do either, and that neither justice nor public policy would be promoted by making the attempt. It certainly has never been thought to be within the province of a court to determine what instruments should be taken from the list of mere choses in action, and clothed with the attributes of negotiability. Bills, foreign and inland, assumed this position upon the immemorial custom of merchants, and were adopted into the law upon the reasons which avail to make up the great body of the common law. But the statute, third and fourth Anne, was found necessary to place promissory notes upon the same footing; and from that day to this, neither in England nor in this country has an instrument been added without express legislative sanction. Indeed, this could not well be otherwise. The necessities of commerce, and the instruments best calculated to answer its purposes, must all be considered before any intelligent decision could be made. These are legislative functions, requiring experience and extensive information, and calling for the exercise of a discretion wholly incompatible with the fixed certainty of judicial decision. But if it were otherwise, and the discretion rested with us, we could not introduce the mortgage deed into the list of negotiable instruments without disregarding the very foundation principles upon which such paper has always been supposed to rest. From the case of *Miller v. Race*, 1 Burr. R. 452, to the very latest case in our own reports, the language of the courts has been uniform, that such paper is only allowed in the interests of commerce, and “possessing some of the attributes of

guil again.

2

Not same reason for reg. 9 w/ger.

money," to answer the purposes of currency. Lord Mansfield, in answer to the "ingenious" argument of Sir Richard Lloyd that the plaintiff could take nothing by assignment from a thief who had stolen paper, said the fallacy of the argument consisted in comparing bank notes to what they did not resemble. "They are not goods," he said, "not securities, nor documents for debt nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind;" "the course of trade creates a property in the assignee or bearer," and they can not be recovered "after they have been paid away in currency, in the usual course of business." This was said, it is true, of bank notes; but the same principles, and for the same reasons, were afterward applied by the same learned judge to every description of negotiable paper, and the case of *Miller v. Race* is still the leading authority upon this branch of commercial law.

Now, mortgages are not necessities of commerce; they have none of the "attributes of money," they do not pass in currency in the ordinary course of business, nor do any of the prompt and decisive rules of the law merchant apply to them. They are "securities," or "documents for debts," used for the purposes of investment, and unavoidably requiring from those who would take them with prudence and safety, an inquiry into the value, condition and title of the property upon which they rest; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends, to any defense, before a court will foreclose his right to defend against those which have been obtained by force or fraud.

Against any amount of mere theory advanced to sustain the position that commerce requires these instruments to be invested with negotiable qualities, may be successfully opposed the stubborn fact, that in the first commercial country of the world, as well as in the great commercial states of the American Union, they have never been used for such purposes, or heard of in such a connection. It is quite immaterial whether this has arisen from the cause supposed—that they are never made to secure negotiable paper—or not; since it equally shows that no necessity for their use has ever been felt. A long experience has demonstrated that they are not necessary instruments of active trade and business; and we but follow in the footsteps of the ablest and wisest judges when we say that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. This remits them to the position they have so long occupied—that of mere choses in action; and whether standing alone or taken to secure negotiable or non-negotiable paper, they are only available for what

Query
today.

was honestly due from the mortgagor to the mortgagee. If they are assigned, either expressly or by legal implication, the assignee takes only the interest which his assignor had in the instrument—acquires but an equity, and, upon the long-established doctrine in courts of equity, is bound to submit to the assertion of the prior equitable rights of third persons. To hold otherwise is to engraft legal incidents upon a mere equitable title; to give to the transfer of negotiable paper an effect beyond what it imports, or is necessary in the accomplishment of its legitimate purposes; and, finally, to invest with negotiable qualities a class of instruments, neither used for nor adapted to the trade and commerce of the country, and thereby to deprive the mortgagor of the just right of defending against fraud, without subserving any public policy whatever.

These views necessarily lead to the conclusion that, upon the facts found in the court below, the plaintiff was entitled to have his title cleared from the incumbrance of this fraudulent mortgage, and that the court erred in giving the affirmative judgment of foreclosure in favor of Smith. For this error that judgment is reversed, and the cause remanded for further proceedings.

PECK, C. J., and BRINCKERHOFF, SCOTT and WILDER, J.J., concurred.¹

Holds if ^{note} ~~note~~ Secured
negotiable note as-
signed of ^{note} ~~note~~ SUPREMACY
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can enforce Appeal from t
MR. JUSTICE S
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B. Carpenter. on

See notes to preceding case.

CARPENTER v. LONGAN.

SUPREME COURT OF THE UNITED STATES, 1872.

(16 Wall. 271.)

Appeal from the Supreme Court of Colorado Territory.

MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the court.—On the 5th of March, 1867, the appellee, Mahala Longan, and Jesse B. Longan, executed their promissory note to Jacob B. Carpenter, or order, for the sum of \$980, payable six months after date, at the Colorado National Bank, in Denver City, with interest at the rate of three and a half per cent. per month until paid. At the same time Mahala Longan executed to Carpenter a mortgage upon certain real estate therein described. The mortgage was conditioned for the payment of the note at maturity, according to its effect. On the 24th of July, 1867, more than two months before the maturity of the note, Jacob B. Carpenter, for a valuable

³*Johnson v. Carpenter*, 7 Minn. 176 (1882); *Bouligny v. Fortier*, 17 La. Ann. 121 (1865), *accord*. And see *Jones v. Dulick*, 55 Pac. Rep. 522 (Kan. 1898).

consideration, assigned the note and mortgage to B. Platte Carpenter, the appellant. The note not being paid at maturity, the appellant filed this bill against Mahala Longan, in the District Court of Jefferson County, Colorado Territory, to foreclose the mortgage.

deft's equity

She answered and alleged that when she executed the mortgage to Jacob B. Carpenter she also delivered to him certain wheat and flour, which he promised to sell, and to apply the proceeds to the payment of the note; that at the maturity of the note she had tendered the amount due upon it, and had demanded the return of the note and mortgage and of the wheat and flour, all which was refused. Subsequently she filed an amended answer, in which she charged that Jacob B. Carpenter had converted the wheat and flour to his own use, and that when the appellant took the assignment of the note and mortgage, he had full knowledge of the facts touching the delivery of the wheat and flour to his assignor. Testimony was taken upon both sides. It was proved that the wheat and flour were in the hands of Miller & Williams, warehousemen, in the city of Denver, that they sold, and received payment for a part, and that the money thus received and the residue of the wheat and flour were lost by their failure. The only question made in the case was, upon whom this loss should fall, whether upon the appellant or the appellee. The view which we have taken of the case renders it unnecessary to advert more fully to the facts relating to the subject. The District Court decreed in favor of the appellant for the full amount of the note and interest. The Supreme Court of the Territory reversed the decree, holding that the value of the wheat and flour should be deducted. The complainant thereupon removed the case to this court by appeal.

It is proved and not controverted that the note and mortgage were assigned to the appellant for a valuable consideration before the maturity of the note. Notice of anything touching the wheat and flour is not brought home to him.

The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is, whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. (Powell on Mortgages, 908; 1 Hilliard on Mortgages, 572; Coote on Mortgages, 304; *Reeves v. Scully*, Walker's Chancery, 248; *Fisher v. Otis*, 3 Chandler, 83; *Martineau v. McCollum*, 4 Id. 153; *Bloomer v. Henderson*, 8 Mich. 395; *Potts v.*

Blackwell, 4 Jones, 58; *Cicotte v. Gagnier*, 2 Mich. 381; *Pierce v. Faunce*, 47 Maine, 507; *Palmer v. Yates*, 3 Sandford, 137; *Taylor v. Page*, 6 Allen, 86; *Croft v. Bunster*, 9 Wis. 503; *Cornell v. Hitchens*, 11 *Id.* 353.) The contract as regards the note was that the maker should pay it at maturity to any *bonâ fide* indorsee, without reference to any defences to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defence against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser rather than a stranger." (*Hern v. Nichols*, 1 Salkeld, 289.)

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threat outgo.

Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. Here the amount due was the face of the note and interest, and that could have been recovered in an action at law. Equity could not find that less was due. It is a case in which equity must follow the law. A decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold, follows necessarily. Powell, cited *supra*, says: "But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor on liquidating the account, although he had paid it before, because the indorsee or assignee has a legal right to the note and a legal remedy at law, which a court of equity ought not to take from him, but to allow him the benefit of on the account."

Debt isn't def
in Eq. but why
does outgo fol-
low debt.

A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under execution. It is not pretended that equity would interpose against him. So, if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another.

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Bah!

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The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied, the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding. The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. (*Jackson v. Blodget*, 5 Cowen. 205; *Jackson v. Willard*, 4 Johnson, 43.)

It must be admitted that there is considerable discrepancy in the authorities upon the question under consideration. In *Baily v. Smith et al.*, 14 Ohio State, 396—a case marked by great ability and fulness of research—the Supreme Court of Ohio came to a conclusion different from that at which we have arrived. The judgment was put chiefly upon the ground that notes negotiable are made so by statute, while there is no such statutory provision as to mortgages, and that hence the assignee takes the latter, as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. To this view of the subject there are several answers.

? why The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

no arg. All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale*.

In *Pierce v. Faunce*, 47 Maine, 513, the court say: "A mortgage

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later.

is *pro tanto* a purchase, and a *bonâ fide* mortgagee is equally entitled to protection as a *bonâ fide* grantee. So the assignee of a mortgage is on the same footing with the *bonâ fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

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Matthews v. Wallwyn, 4 Vesey, 126, is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally: "The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment." The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity. So neither can it be worse. Upon this ground we place our judgment. We think the doctrine we have laid down is sustained by reason, principle, and the greater weight of authority.

See p. 647 ←

But he also
pointed out that
assignee is not
exactly a B.F.P.
647 ←

Perhaps straight
arg.

Decree reversed.

For authorities see next case note.

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PAIGE V. CHAPMAN.

SUPREME COURT OF NEW HAMPSHIRE, 1878.

(58 N. H. 333.)

WRIT OF ENTRY, on a mortgage made to secure the defendant's note, endorsed and delivered with the mortgage, by the payee, to the

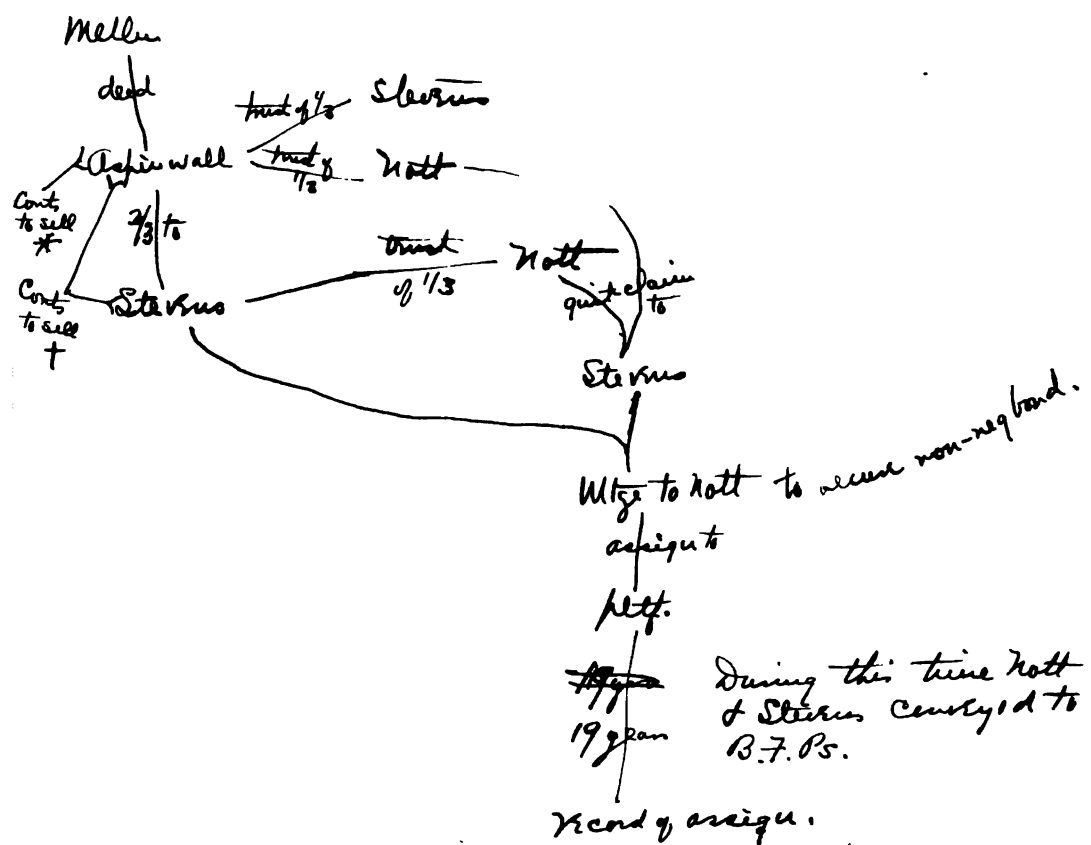
plaintiff, before maturity, as collateral security. The plaintiff received the note and mortgage in good faith in the ordinary course of business, and with no notice of any equities between the mortgagee and the defendant. The question whether the defence of want of consideration, and that the note and mortgage were obtained from the mortgagor by fraudulent representations, can be made, is reserved.

ALLEN, J. Negotiable paper, received for value, before maturity, in the ordinary course of business, without notice of infirmity, is, in the hands of a purchaser, freed from defences by the maker. The same is true when the paper is received and held as collateral security. (*Tucker v. Savings Bank*, ante, 83.) A mortgage is incident to the debt secured by it, and a transfer of the note or other evidence of debt carries the mortgage with it. (*Wheeler v. Emerson*, 45 N. H. 527.) Any defences, open to the maker in a suit on the note, may be made use of in an action on the mortgage. (*Northy v. Northy*, 45 N. H. 141.) The mortgage follows the debt as a shadow does its object, and cannot exist without it. Whoever holds the evidence of debt holds the mortgage security, and payment of the debt extinguishes the mortgage. The debt is the principal thing, and imparts its character to the mortgage, and the legal rights and remedies upon the debt become fixed upon its incident, the mortgage. Defences which cannot be made against the note, because it has travelled away from them, cannot be made against the mortgage which has kept company with the note. The freedom from infirmity, which the innocent purchaser and holder of the note enjoys, cannot be destroyed or made less by taking with the note a mortgage made and intended as security. The plaintiff received the note and mortgage in good faith, before the debt had matured, and with no notice of defect or defence. The defence sought to be set up cannot be made. (*Carpenter v. Longan*, 16 Wall. 271.; *Taylor v. Page*, 6 Allen, 86; *Sprague v. Graham*, 29 Me. 160; *Pierce v. Faunce*, 47 Me. 507; *Gould v. Marsh*, 1 Hun (N. Y.) 566; *Jones on Mort.* 834, 835, 840.)¹

Case discharged.

BINGHAM, J., did not sit.

¹*Fisher v. Otis*, 3 Chand. (Mich.) 83 (1850), *Dutton v. Ives*, 5 Mich. 515 (1858), *Croft v. Bunster*, 9 Wis. 503 (1859), *Gould v. Marsh*, 1 Hun. (N. Y.) 566 (1874), *Duncan v. Louisville*, 13 Bush (Ky.) 378 (1877), *Bassett v. Daniels*, 136 Mass. 547 (1884), accord. But see *Franklin v. Tirolegood*, 18 Iowa, 515 (1865).



Record of assign.

Question discussed in case is whether pty can foreclose vs the vendees in the Cont. of sale made by Aspinwall and by Aspinwall & Sterns. See * + + above. Held cannot. Mortgage to Nott was subject to those Conts as he had notice of them. Rest of arg. see notes in margin.

(1) If pty is not a B.F.P., it wasn't here as debt was a non-neg. bond & as Ct. pointed out, did not get deed to land so far as appears, then we saw he takes subject to Equities of catgor. Our case raises? as to Equities of 3rd parties. No dif. from same question in assignments. On strict theory 3rd parties shd be protected. Much practical convenience in making choses semi or demi negotiable & not protecting them.

Stevens gave a mtge of prop. to Nott. Part had been already subjected to contract of sale by Stevens.
 TRUSTEES OF UNION COLLEGE v. WHEELER. *as Nott knew.*

COMMISSION OF APPEALS OF NEW YORK, 1874. *part Nott was*

(61 N. Y. 88.)¹

APPEAL from so much of the judgment of the General Term of the Supreme Court, in the fourth judicial department, as affirms in part a judgment dismissing the plaintiff's complaint, entered on the report of the referee. (Reported below 5 Lans. 160; 59 Barb. 385.) *briefly interested in share of prop. conveyed his int. to Stevens. Nott assigned mtge to Philo.*

This action was brought to foreclose a mortgage executed by Philo Stevens to Benjamin Nott, to secure the payment of \$2,800. It bears date July 18th, 1833, and was recorded August 8th, 1833. It covered, when given, four pieces of land, viz.: three in the then village of Oswego and a large tract in the town Scriba. The mortgage was assigned by Nott to the plaintiff by an assignment bearing date the 1st day of July, 1834, which was recorded on the 25th day of December, 1852. *who were bona fide purchasers. Charles. Nott for debt. The trustees in orig cents of sale. Assignee takes subject not only to equities of mtge vs. mtge but to those of 9. 3rd parties is mtge. That mtge passes legal title & so assignee gets legal title and so is protected is here that all only under old legal view of mtge not law in U.S. Anyhow we do send here to pass legal title to assignee.*

The complaint, after stating the above facts, further states that a portion of the mortgaged premises, being two of the parcels of land in Oswego, had been released from the lien of the mortgage, and as to them the plaintiff made no claim, but alleged that the residue remained subject thereto.

Several of the defendants answered and set up that they were owners of different portions of the lands lying in Scriba, which they claimed were not subject to the lien of the plaintiff's mortgage, having been discharged by the transactions referred to in the opinions. The issues were referred to a referee, who dismissed the plaintiff's complaint.

The General Term on appeal reversed the judgment, so far as it related to most of the mortgaged premises, but affirmed it as to the residue. The further facts are set forth at length in the opinions.

DWIGHT, C. The facts of this case show that on October 1st, 1828, one Mellen conveyed a large tract of land, including the premises in question, to Chauncey B. Aspinwall. The consideration for the land was paid by Aspinwall, Philo Stevens and Benjamin Nott, in equal portions, and each were equally interested in the property.

Aspinwall, by deed bearing date January 26, 1830, conveyed an undivided two-thirds part of the property to Stevens, for the consideration of \$2,000. While Aspinwall held the property he executed contracts of sale of portions of the land to a number of

¹The report of this case is much abbreviated. the opinion of Lott, Ch.C., and considerable portions of the opinions of Dwight, C., being omitted.

mtge secured non-... the land.

distinct purchasers, in his own name, for the benefit of himself and Stevens and Nott, to whom he accounted from time to time for the proceeds of sales. After the conveyance to Stevens sales were made of other portions, the contracts being executed by Aspinwall and Stevens, and the proceeds being accounted for to Nott, as before.

Apparently all sales took place before this mortgage to Nott.
 While matters stood in this condition, Nott, by a quit-claim deed dated July 18, 1833, in consideration of one dollar, conveyed to Stevens all the lands described in the deed from Mellen to Aspinwall, and also village lots in Oswego, of which two-thirds belonged to Nott and one-third to Stevens. Stevens, by mortgage bearing date the same day with the last mentioned deed, mortgaged to Nott the property conveyed to Aspinwall by Mellen, whether under contract or not, and also the village property above referred to, to secure the payment of \$2,800, with interest semi-annually. The mortgage was payable in five years from date, was accompanied by Stevens' bond, and duly recorded August 8, 1833.

The bond and mortgage were assigned to the plaintiff July 1, 1834, for the sum of \$2,790.37, which was then paid to Nott. The execution of the assignment was proved by a subscribing witness, December 17, 1853, and the assignment recorded on the twentieth of the same month and year. While the mortgage, in form, covered the entire property sold to Aspinwall, yet it was conceded, on the trial, that some portions of it had been actually conveyed before the execution of the mortgage, and to this no claim was made by the plaintiff.

It will be observed, from the facts already detailed, that upward of nineteen years elapsed between the execution of the assignment and its record. Within this period, on March 28, 1836, Nott, still assuming to be the owner of the mortgage, released to Stevens some of the village lots embraced in the mortgage, who conveyed them to purchasers about the time that the releases were executed. It appeared that the lots so released were more than sufficient in value, at that time, to pay the mortgage. The purchasers under Stevens had no notice of the assignment to the plaintiff.

There is still due and unpaid on the mortgage the principal sum of \$2,800, with interest from January 1st, 1864, amounting on December 3d, 1870, to \$4,157.28.

*Omit to **
A. 686.
 The questions raised on the present appeal, under this state of facts are: First. Whether the lien of the mortgage is superior to the claims of the purchasers under the contracts. Second. If the plaintiff is bound by the contracts, whether it is not entitled to the purchase-money unpaid upon them. Third. Whether the release of the village lots by Nott does not, as between the purchasers and the plaintiff, discharge their lots from the lien of the mortgage?

1. In considering the first question it will be necessary, at the

(2) Last part of opinion as to B.F.P. of legal title to land rather weak. (a) If got legal title can only hold it to enforce debt & so Court's straining to show that didn't get legal title wrong. (b) Arg. that since mortgage is a lien in N.Y. Can't get legal title seems wrong. Is surely a legal lien & surely that can be transferred. But totally immaterial because of (a) above.

(3) Note statutes as to recording act at
End. N.Y. statute unusual.

Error. Debt (bond) was not subject to Equities — only land was. So mtg good for whole amt if to be good as far as bond was good. But Nott wd take his legal lien on land sub-ject to Equities. But when he passed on that legal lien to a B.F.P. Secures would cut off Equities & ~~land sold from~~ ~~recourse~~ ~~debt~~ ^{Equities} debt. Is a legal title & assignment in writing wd comply with St. Frds. Surely a lien is not such a prehold int. as would require a deed.

outset, to examine the relations between Aspinwall and Nott, as well as between the latter and Stevens. When Aspinwall took the title, the common law of trusts was in full operation; he undoubtedly held the property as a trustee, both for Nott and Stevens. In other words, the payment of a portion of the consideration by each of these parties caused a trust *pro tanto* to result in their favor. This could be proved by parol evidence. (2 Washburn on Real Property, 176, par. 17, and cases cited.) When Aspinwall conveyed to Stevens he transferred an estate to him charged with a valid existing trust, of which Stevens had full knowledge. Stevens, according to elementary rules, became himself a trustee for Nott to the extent of the interest conveyed to him. (1 Spence's Eq. Jur. 512; Willis on Trustees, 64; 2 Washb. 178, par. 21.)

During the whole period from October 1, 1828, to the time of the execution of the mortgage, the relation of trustee and *cestui que trust* existed between Aspinwall and Nott, or Stevens and Nott. These trustees were accountable to Nott in a court of equity. They had the management of the estate, had the legal power to sell, and their acts were acquiesced in by the *cestui que trust* and ratified by the accountings held from time to time. Under these circumstances the purchasers under the contracts had an equity superior to that of Nott. At the moment when he conveyed to Stevens, they could have enforced the agreements against him, on payment of the residue of the purchase-money, and against Stevens, his successor in interest. Nott and Stevens held the legal title, as trustees for the purchasers under the contracts.

The sale by Nott to Stevens and the execution of the mortgage to the former worked no change in this state of things. At the moment of sale he was a trustee for the purchasers under the contract. By a familiar rule in the law of trusts he could not buy or sell to the prejudice of the *cestuis que trusts*. His sale to Stevens, and taking back a mortgage for the purchase-money, left him precisely where he was before the transaction was entered into—still charged with the execution of the trust in favor of the purchasers under the contracts. It was, therefore, quite immaterial, as far as Nott was concerned, to show that he had constructive notice of the contracts by the possession of the purchasers. His duty toward them did not depend upon notice, but upon the inherent equities of the case. Suppose that after he had sold to Stevens he had immediately repurchased from him; would he not have been subject to the same equities as he was liable to before the sale? The authorities are distinct that he would.

A mortgage could give him no more rights than an absolute purchase. It is thus clear that if Nott had remained owner of the

Seems Nott never had legal title. Does not affect Ct. argument.

Alp in trust. Had notice & sold out of these contr.

mortgage of July 18, 1833, and had sought to foreclose it, he would have been bound by the same equities as before his sale of that date, and would have been required to allow the claims of the purchasers under the contract.

Does the plaintiff occupy the position of Nott, or can it urge that it is a purchaser in good faith, and for value, and thus shut out the equities between the contractees and Nott, or is it governed by the rule that the assignee of a mortgage takes subject to the equities between the original parties? According to the reasoning thus far, this is a case of an inherent equity as between a person having an interest in the equity of redemption and the mortgage. The mortgage, in form, covers the property claimed by the contractees; if they do not fulfill the contract, it certainly embraces it in full. What they say to the mortgagee is this: "Owing to certain equities between us and you, it is inequitable to enforce the mortgage against property which, as a matter of law, is actually covered by it, except you respect our rights."

Is, then, the plaintiff in any better position than Nott, the mortgagee? It is well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged; what he can do the assignee can do, and no more. In *Clute v. Robison*, 2 J. R. 612, the rule, as stated by Kent, Ch. J., is, that a mortgage is liable to the same equity in the hands of the assignee that existed against it in the hands of the obligee. (2 Vern. 692, 765; 1 Vesey, 122.) The rule is not simply that the assignee takes subject to the equities between the original parties, though that is sound law. (*Ingraham v. Disborough*, 4 N. Y. 421.) It goes further than this, and declares that the purchaser of a chose in action must always abide by the case of the person from whom he buys. (Per Lord Thurlow, in *Davies v. Austen*, 1 Vesey, Jr., 247.) The reason of the rule is, that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. (*Beebe v. Bank of New York*, 1 J. R. 552, per Spencer, J., and 549, per Tompkins, J.) Kent, Ch. J., in a dissenting opinion in the same case, would have confined the rule to the equities between the original parties to the contract. (*Id.* 573.) The opinions of Spencer and Tompkins, JJ., were, however, recognized as the correct exposition of the law in *Bush v. Lathrop*, 22 N. Y. 535. A considerable number of authorities are cited by the plaintiff as tending to show that the assignee

Cont



of a chose in action is only subject to the equities between the contractor (assignor) and the debtor, and not to the so called latent equities of third persons. Such cases as *James v. Morey*, 2 Cowen, 298, opinion of Sutherland, J.; *Bloomer v. Henderson*, 8 Mich. 402; *Mott v. Clarke*, 9 Barr, 404, and others of the same class, were reviewed as to their principle or specifically in *Bush v. Lathrop*, 22 N. Y. 535, and repudiated. The doctrine of Lord Thurlow, in England, and of Spencer and Tompkins, JJ., already considered, was thus adopted rather than that of Kent, Ch. J. The law of some of the other States undoubtedly coincides with the views of Kent, but, since the decision in *Bush v. Lathrop*, must be regarded as without authority here.

The correct theory is well stated in 2 Story on Equity Jurisprudence, section 1040: "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession." This theory would lead to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his name and on the supposition that, for the purposes of the action, he is still owner. The case of *Dillaye v. Commercial Bank of Whitehall*, 51 N. Y. 345, is not opposed to this view, as the question in that case was not one of the enforcement of a mortgage, but concerned the title of the two claimants to the ownership of the mortgage itself. The point was, whether one who held a mortgage in trust, with an apparently unrestricted power of disposition, could transfer it free from the claims of the *cestui que trust* to a purchaser in good faith. It was held that he could. This case has no tendency to establish any right on the part of the assignee in enforcing the mortgage beyond that possessed by his assignor.

The plaintiff cites, to support his view, authorities to the effect that an assignee is a purchaser, and to the effect that "a mortgage is in form a conveyance of the land and an assignment of it is another conveyance of the same land." These cases, which are very numerous in the law books, refer only to the position of a mortgagee or assignee in a court of law, and were decided in England and in States of the Union where more technical views of the rights of a mortgagee in a court of law prevail than in this State. They are of no force in a court of equity, in which the case at bar is assumed to be pending, for in such a tribunal a mortgage is but a chose in action and security for a debt. Reference is also made to a class of cases appearing in the law reports of a number of the States, holding, in substance, that when a mortgage is given to

Must go on and that off the property. Chances of equity got it free of Equities.

See case in v.

Query de hoc. Comit hardly answers the Arg. here.

secure a negotiable note, which is itself transferred before maturity for value, it is taken by the assignee free from all equities. It is argued that these authorities tend to show that the mortgage partakes of the nature of the debt, in such a sense that only the direct equities between the debtor and the creditor can be set up as against the assignee. These cases have not yet become established law in this State. (*Carpenter v. Longan*, 16 Wall. [U. S.] 271; *Kenickott v. Supervisors*, id. 452; *Taylor v. Page*, 6 Allen, 86; *Croft v. Bunster*, 9 Wis. 510.) If sound, they must be made to rest on rules of law attending the transfer of negotiable paper, and cannot be held by indirection to overthrow a rule concerning the ordinary bond and mortgage which has become fixed in our jurisprudence.

The result is that the plaintiff in the present case takes subject to the rights of the purchasers under the contracts, by reason of the equities between them and Nott and without reference to any actual or even constructive notice of such equities as between such purchasers and the mortgagee.

The judgment of the court below should be affirmed.

All concur.

* A motion having been made for reargument, the following opinion was given, on denying the motion.

DWIGHT, C. The plaintiff in this cause moves for a reargument on three grounds: First. That this court erred in holding that the plaintiff took the same position in respect to the mortgage which was the subject of foreclosure in the present action as its assignor, Nott, the mortgagee. Second. That the court should have held that, where the contracts owned by the respondents were assigned subsequent to the record of the mortgage, the plaintiff has a lien for the purchase-money unpaid at the time of such assignment. Third. That the court committed another error in holding that after Nott had made the assignment and continued the apparent owner, the assignment being unrecorded, and the respondents having no notice of such assignment, his release from the lien of the mortgage of certain portions of the premises which were primarily liable to pay the debt, was binding on the plaintiff and so discharged the respondents.

Before considering the first proposition, it will be well to recall the exact relations of the parties. Nott held a mortgage upon certain lands to which the mortgagor held the legal title, but which in part had been sold by a valid contract to some of the defendants. The validity of the contract is undisputed, as is also the fact that Nott, the mortgagee, had full notice of the equities of those defendants, and was bound in equity to recognize them.

These not discussed in part here given.

Position of Nott.

Starting with this proposition, the counsel for the plaintiff maintains that the plaintiff, if considered as a purchaser of a chose in action without notice, is not bound to recognize the equities to which Nott would have been subject; and again, that it is a purchaser of the legal title to the land, and that it can invoke the rule that the honest purchaser of land for a valuable consideration can shut out any equities which might have existed between the mortgagor, as well those whom he represented, and the mortgagee.

In urging the first branch of this proposition, he calls our attention to the supposed fact that the case of *Bush v. Lathrop*, 22 N. Y. 535, and cited as authority in one of the opinions disposing of this cause, has been overruled, and with it, that the doctrine on which we relied has fallen. This, however, is an incorrect assumption, for that case has not been overruled as a whole, but only as to one proposition maintained in it. See *Moore v. Metropolitan Bk.*, 55 N. Y. 41. It is there stated that several propositions in *Bush v. Lathrop* were decided "with perfect accuracy." The special point in respect to which there is a conflict between the two cases is, whether an assignor of a chose in action can set up any equities affecting the title between himself and his assignee, in an action brought by a second assignee. There was no question whatever as to the equities growing out of the chose in action itself, as between the original parties to it or an assignee of the creditor. On that point the court was careful to avoid all misconstruction in using the following language: "The counsel" (for the defendant) "further insists that to apply the same rule" (of estoppel) "to non-negotiable choses in action will in effect make them negotiable. Not at all. No one pretends but that the purchaser will take the former, subject to all defences, valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse. In both respects, the difference between these and negotiable instruments is vital." (P. 48.) The court is also careful, on pages 49, 50 of the report, to preserve the force of the cases, decided by the present Court of Appeals, which have followed *Bush v. Lathrop* in the respect referred to—cases of which *Schafer v. Reilly*, 50 N. Y. 61, is one, and bears closely upon the present discussion. The point in *Moore v. Metropolitan Bank* is simply whether the law of estoppel is applicable on the question of title as between a first assignee and a remote purchaser of a non-negotiable chose in action. It is held that it is. The rule that the chose in action itself is open to all defences growing out of the original transaction, in the hands of any assignee, no matter how remote, remains unshaken, and must continue so until elementary rules of law are overthrown.

Pt. (1)

Pt. (2)

Arg. vs Pt. (1)

For cont.

whether a
transfer of
Equity out
of Equities
is the Equity
Held down.

Cont.

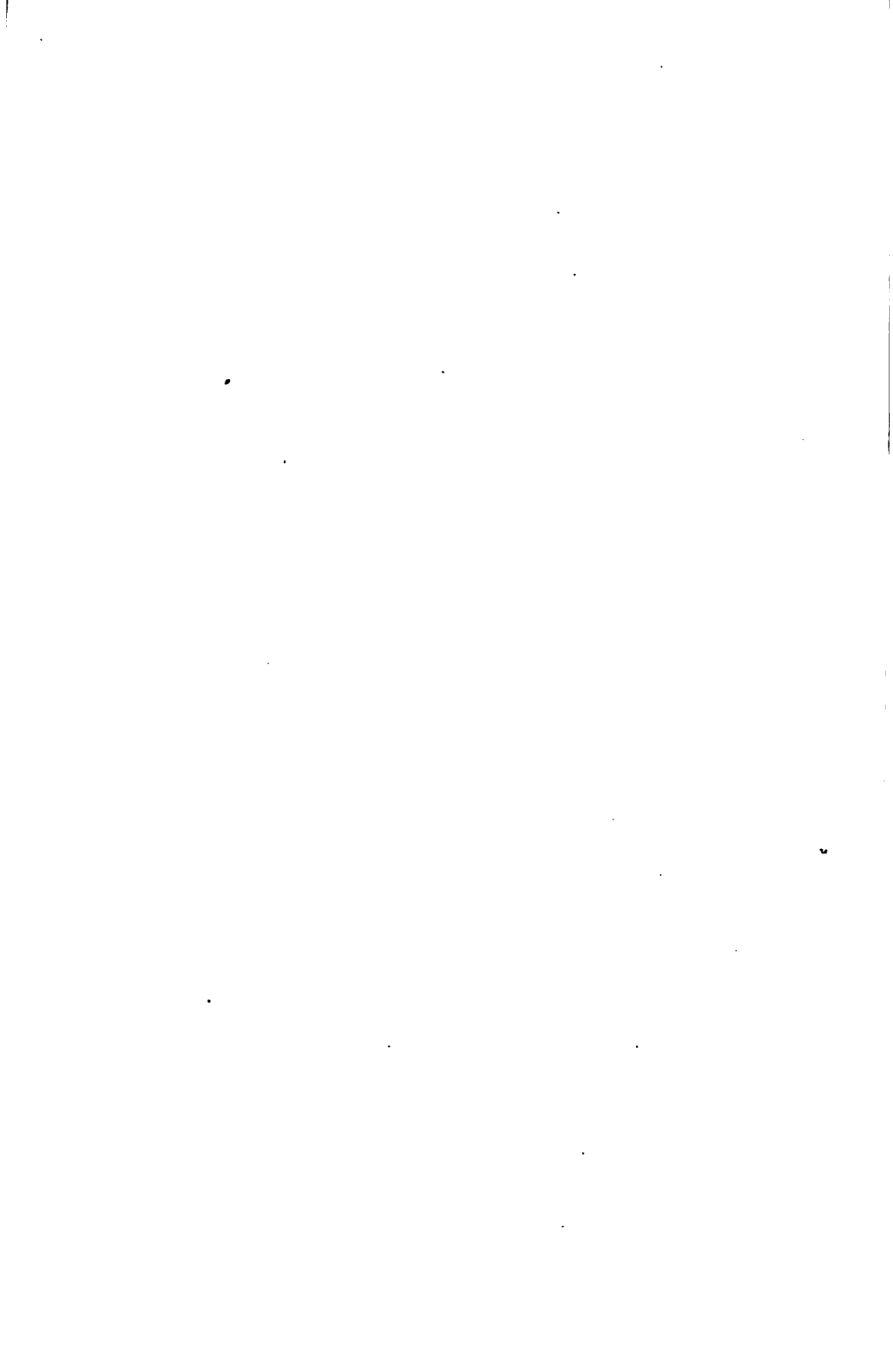
The rule laid down by us in the case at bar is distinctly stated and affirmed in *Schafer v. Reilly*, 50 N. Y. 61. It is there said that one who takes an assignment of a mortgage takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons. This case emphatically approves of *Bush v. Lathrop*, so far as it holds this point, and declares its doctrine to be settled law. None of the cases, we repeat, in which the present Court of Appeals have followed that case, are to be regarded as overruled by *Moore v. Metropolitan Bank*, *supra*. It must accordingly be held to be still the law of this State, that the purchaser of a non-negotiable chose in action, secured by a mortgage, takes it subject to the latent equities not only of the mortgagor but of third persons.

The counsel of the plaintiff, however, maintains that if it be conceded that this doctrine applies to the debt it does not apply to the mortgage. His argument is, that the mortgage itself creates a legal estate in the land, and that so far as the land is concerned, an assignee of a mortgage is a purchaser of the legal estate for a valuable consideration, and entitled to exclude the equities. There is thus, according to this proposition, one rule for the land and another for the debt. If the debt were collected by action for its amount the equities would be let in; if it were collected by foreclosure of the mortgage they would be shut out. This, if true, is certainly an extraordinary proposition. It is very comprehensive in its nature, for it would exclude the equities of the mortgagor as well as the latent equities of third persons. Under our compound system of foreclosure and of obtaining a personal judgment for the deficiency, there would be one rule for the first branch of the case and an entirely different one for the last.

None of the cases cited by the counsel, on this motion for re-argument, sustain his proposition as being part of our law. They have all been examined, and it is unnecessary to consider them in detail. The point is really decided against him in *Schafer v. Reilly*, *supra*. The contest in that case concerned the right to surplus moneys after a foreclosure, and was in substance a question as to the title to land, the money standing, under the doctrine of equitable conversion, in the place of land. It appeared that there was a second mortgage, of a fictitious nature, made by one John Reilly to Peter Reilly, on which nothing had been advanced, and which was of course incapable of enforcement by Peter. This was assigned to one Catherine M. Burchard, who paid a valuable consideration, acting in good faith, and upon an affidavit by the mortgagor that Peter Reilly had advanced to him the whole amount of the principal without abatement, that the whole sum remained

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unpaid, and that there was no off-set, defence or counter-claim to the mortgage. The mortgage was dated and executed anterior to the claim of one Griffin, who had acquired, subsequently, a mechanic's lien upon the land, but before Mrs. Burchard became assignee. Of his rights at that time she was ignorant. The question was, who had, under these circumstances, the better right to the surplus moneys, considered as land. The court held that, notwithstanding the mortgage was, on its face, executed prior to the mechanic's lien, it might be shown by Griffin that his lien was in existence when Mrs. Burchard advanced her money, and that his right could not be affected by the mortgage. The court there broadly applied the rule, that if Griffin's claim was an equitable one and latent, it could still be set up by him against the assignee. The estoppel against John Reilly, caused by his affidavit, had no effect upon the rights of Griffin. The court rested this decision on the ground that though Griffin's right might be a latent equity, yet the assignee must take the mortgage considered as an interest in the land, and not merely the debt, subject to the equity. The same class of cases that were relied upon by the plaintiff's counsel in the argument of the present motion were cited to the court, as showing that the assignee of the mortgage was a purchaser for value. Their application to the subject in hand was denied, and the rule of Lord Thurlow, in *Davies v. Austen*, 1 Ves. 247, was pronounced to be the principle governing the case. "A purchaser of a chose in action must always abide by the case of the person from whom he buys." (*Schafer v. Reilly*, 50 N. Y. 67, 68.) This was the precise ground on which the case at bar was rested.

The plaintiff is mistaken in the supposition that the present case is one merely of notice of equitable rights on the part of third parties to Nott, the mortgagee, and, accordingly, that it is not bound by the notice under the ordinary doctrines applied to the purchaser in good faith, and for a valuable consideration, acquiring title to lands. On the contrary, the difficulty is that Nott took his mortgage, subject to the older and better title of the contractees. To their estate his mortgage never attached in equity. The land belonged to them in equity, and the most that Nott could acquire under any circumstances, as against them, was a lien for the unpaid purchase-money. This is not an interest in the land but only in the money, and to be obtained by an assignee of Nott in no manner, except by due notice of the mortgage and assignment given to the contractees. The plaintiff simply acquired Nott's rights, and stood in his place, according to *Schafer v. Reilly*, *supra*. (See also, *Andrews v. Torrey*, 1 McCarter [N. J.] 355.) The cases of *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Jackson v. Henry*, 10

Lien of mortgage is
not an interest
in land. Same
as bot. next
page.

J. R. 185; *Varick v. Briggs*, 6 Paige, 323; *Fort v. Burch*, 5 Den. 187, and others cited by the appellant, have no application to the case at bar. Those and others of the same nature are either cases of title obtained by fraud, or involve the effect of notice under the recording acts, or are instances of mortgages accompanying negotiable notes, and declared to partake of the character of the note. They are noticed and distinguished in *Schafer v. Reilly*, *supra*, and it is unnecessary to spend time upon them.

Legal title doesn't pass as no deed

It should be added that, under the rules of equity jurisprudence, it is essential that one who claims to exclude an earlier equity must show that he is not only a purchaser, but has acquired the legal estate. What evidence was there, in the case at bar, that the plaintiff had acquired the legal estate? The complaint merely alleges an assignment of the debt and mortgage in writing. The referee only finds an assignment in writing. There is not a word anywhere concerning the acquisition of the mortgage by a deed or other instrument under seal. If the mortgagee had the "legal" estate, he did not transfer it by such an instrument as the law requires to transfer a freehold estate in land. The plaintiff was, undoubtedly, the equitable owner, by force of the assignment of the bond and the mortgage accompanying it, but that was not enough. The legal title must pass. (*Peabody v. Fenton*, 3 Barb. Ch. 451.) The authorities, to the effect that a deed or other mode of conveyance is necessary to pass the legal estate, strongly preponderate. (*Den v. Dimon*, 5 Halst. [N. J.] 156; *Warden v. Adams*, 15 Mass. 233; *Jackson v. Myers*, 11 Wend. 533, 539; *Morrison v. Mendenhall*, 18 Minn. 232; *Cottrell v. Adams*, 2 Bissell, 351; *Olds v. Cummings*, 31 Ill. 188; *Partridge v. Partridge*, 38 Penn. St. 78; *Graham v. Newman*, 21 Ala. 497; *Lyford v. Ross*, 33 Me. 197; *Smith v. Kelley*, 27 *id.* 237; *Givan v. Tout*, 7 Blackf. 210; 2 Washburn on Real Property [3d ed.], page 113, paragraphs 12 and 16, and cases cited.) Such cases as *Green v. Hart*, 1 J. R. 590; *Jackson v. Blodget*, 5 Cow. 202, and *Jackson v. Willard*, 4 J. R. 43, do not affect this question, as the matter of passing the legal title to the mortgage was not in controversy. *Johnson v. Hart*, 3 J. Cas. 322, only decides that by the transfer of the debt an equitable title to the mortgage passes.

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Legal title can't pass as nuptes has it not but only a lien.

It is, however, not our intention to hold that the legal estate, under the present law of this State, ever does or can pass from the mortgagee to the assignee. On the other hand, it is now settled law that the mortgage is but a lien upon the land. The mortgagor, both in law and equity, is regarded as the owner of the fee, and the mortgage is a mere chose in action, a security of a personal nature. An assignment of a mortgage, in this view, cannot pass

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(the title. (*Jackson v. Myers*, 11 Wend. 533, 539; *Kortright v. Cady*, 21 N. Y. 343; *Trimm v. Marsh*, 54 *id.* 599, 604; *Stoddard v. Hart*, 23 *id.* 559, 560; *Power v. Lester*, *id.* 527.) Rules owing their existence to a contrast between law and equity, and giving the later holder of a legal title a preference over an earlier holder of an equitable title, are not to be applied to a state of the law so entirely different from that which prevailed when the law of mortgages first originated. In other words, the power of a vendee of land to convey to a second purchaser, so as to shut out the equities between himself and the original vendor, is not to be referred to for the purpose of ascertaining the capacity of a mortgagee when he makes an assignment of the mortgage to shut out the equities between himself and the mortgagor, and those whom the mortgagor represents. If that rule were ever a part of the law of mortgages, the development of that branch of jurisprudence in this State demands that it should be discarded. . . .

The motion for reargument is denied.

All concur.

omit

DAVIS v. BECHSTEIN.

COURT OF APPEALS OF NEW YORK, 1877.

(69 N. Y. 440.)

Mtge given as accom. & only for a certain use. Use failed. Mtgee did not return mtge & later transferred it to a bona fide purchaser. The latter is now assignee & has no right to assign.

This was an appeal from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, modifying the judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and as modified affirming the same. *Mtge re-converted*

This action was brought to have a bond and mortgage on lands belonging to plaintiff set aside and cancelled. The bond and mortgage were executed by plaintiff and her husband to Lawrence A. Riley, and delivered to him as an accommodation, to be used as collateral security for the payment of a note, which he contemplated getting discounted, and under an agreement with him that he should not have it recorded. Riley failed to procure the discount and plaintiff repeatedly requested the return of the bond and mortgage; Riley promised to return the same from time to time, but failed to do so, had the mortgage recorded, and assigned the bond and mortgage for a valuable consideration to the defendant, Bechstein. Plaintiff's husband was not made a party to this

action. It did not appear that he had any interest in the real estate covered by the mortgage. A judgment was entered in favor of the plaintiff, declaring the bond and mortgage in suit void, and directing that defendant Bechstein surrender and deliver up the same. The General Term modified this judgment so as to declare the bond and mortgage void only as against plaintiff, and that the register of the city and county of New York be required to enter upon the record of the mortgage that it was adjudged void as against plaintiff, striking out the provision in the judgment directing the mortgage to be surrendered up and cancelled.

CHURCH, Ch. J. Neither the decision in *McNeil v. The Tenth National Bank*, 46 N. Y. 325, nor in *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, affect the question involved in this case. Those cases hold that the owner of a chose in action is estopped from asserting his title against a *bonâ fide* purchaser for value, who purchased upon the faith of an apparent absolute ownership by assignment, conferred by the owner upon the assignee and seller, but neither of them intimated an intention to interfere with the well settled principle, that a purchaser of a chose in action takes it subject to the equities between the original parties, and that the assignor can give no better title than he himself has. On the contrary, Grover, J., in the last case declared, in answer to the suggestion that these principles might be impaired by the decision, that "no one pretends but that the purchaser will take the former (non-negotiable choses in action) subject to all defences valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse." It is only where the owner, by his own affirmative act, has conferred the apparent title and absolute ownership upon another, upon the faith of which the chose in action has been purchased for value, that he is precluded from asserting his real title, and this conclusion was arrived at by the application of the doctrine of estoppel.

At the time Riley transferred the bond and mortgage to the defendant Bechstein, as between him and the plaintiff, the mortgagor, he had no title or interest which he could transfer. The mortgage was executed and delivered to him as an accommodation, to be used as collateral security for the payment of a note of \$2,000, which he contemplated getting discounted at the New York National Exchange Bank, and under an agreement not to have it recorded. He failed to procure the discount, and the plaintiff repeatedly requested the return of the bond and mortgage, and Riley promised to return the same from time to time. It is very clear that the bond and mortgage in his hands were of no value, and that he could not have enforced them, and the defendant, when he

Must go on & stop as having for y. s. & hardly affect one having legal title.



purchased, occupied no better position. Riley could not sell any better title than he had, which was none, and the defendant could not acquire by the purchase from him any better title. The specific transaction in which the mortgage was to be used having failed, Riley's possession and right to the mortgage after that was no different than if it had been delivered to him without any agreement for its use at all. He was then the possessor of the bond and mortgage executed and delivered without consideration, and without authority to use it for any purpose. I have examined the evidence and am of the opinion that it is sufficient to sustain the findings of the Judge, and therefore the findings are conclusive. The husband was not made a party, and a mis-trial is claimed for this reason. He had no interest, as it appears, in the real estate, and the defect should have been taken by answer or demurrer. Otherwise it is deemed waived. (Code, § 148.)

The General Term modified the judgment, so as to preserve all the rights of the defendant against the husband, and he cannot in any event be injured.

The judgment must be affirmed.

All concur; RAPALLO, J., not voting.

*Judgment affirmed.*¹

NEW JERSEY GEN. STAT., 1896. MORTGAGES § 31 (p. 2108). [It is enacted] That all mortgages on land in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and such assignments shall pass and convey the estate of such assignor in the mortgaged premises, and the assignee may sue thereon in his own name; but in such suit there shall be allowed all just off-sets and other defenses against the assignor that would have been allowed in any action brought by him and existing before notice of such assignment. . . .

Made record of assign. valid. Even is subject apparently.

§ 32. That the clerks of the several counties of this State be and they are hereby authorized to record in suitable books to be provided for that purpose any assignment of any mortgage upon

¹*Westfall v. Jones*, 23 Barb. (N. Y.) 9 (1856), and *Hill v. Hoole*, 116 N. Y. 299 (1889), accord. But see *First Nat. Bank of Corry v. Stiles*, 22 Hun. 339 (1880), in which it was held that a mortgage in the usual form, given to raise money for the mortgagor, but improperly negotiated and assigned by the mortgagee for his own purposes, "by the very form of the mortgage itself" created an estoppel against the mortgagor and those claiming under him. To the same effect see *Commonwealth v. Councils of Pittsburgh*, 34 Pa. St. 406, 520 (1859), and compare *Davis v. Burr*, 9 S. and R. (Pa.) 137 (1822) and *McMasters v. Wilhelm*, 85 Pa. St. 218 (1877).

950R.137 is erroneous dec. as to chases in action. Made assignee a B.F. P. Pr. right in Special Perm. St. Ct. relies on.

34 Pa. St. 520 is like 950R. above. Not even so clear.

lands within their respective counties. . . .; and such recording shall be notice, from the time such assignment is left for that purpose, to all persons concerned that said mortgage is so assigned. . . .

§ 34. That when any assignment hereafter made is not recorded, as in this act provided, any payments made to the assignor in good faith, and without actual notice of such assignment, and any release of said mortgaged premises or any part thereof, to a person not having actual notice of such assignment, shall be as valid as if said mortgage had not been assigned.

*Contra to last
St.*

NEW YORK REAL PROP. LAW, § 271 (1 R. S. 763, § 41).—The recording of an assignment of a mortgage is not in itself a notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee.

As to place of payment authority, tho' not much as to notes specially, is with these selections. Follows genl rule as to place of payment.

1. Pay to Cred. if in juris.
2. Need not go out of juris. to seek him: ~~then readiness to~~ then readiness to pay, kept good, is equiv. to tender.
3. If must pay in ^{handing articles} ~~chattel~~ then Wt. is with view here given. For other views see cond.
- 4 If to pay in light chattels then residence or place of bus. of obligee.

Best to fix place & avoid trouble.

Keeping ready where cred out of juris not usually put in but no doubt need to make valid tender. Most can do is tender where out of juris. If mtgor will not take money that of course reduces paymt to tender also. Tender to avoid int. & costs must be kept good.

102
of course
to here

CHAPTER V.

DISCHARGE OF MORTGAGE.

SECTION I. TENDER AND PAYMENT.

(a) *In General.*

LIT. §§ 334, 335, 337, 338, 339, and Co. LIT. 209,
reprinted at pages 9-11, *supra*.

LIT. § 340. Also, upon such case of feoffment in morgage, a ques-
tion hath been demanded in what place the feoffor is bound to
tender the money to the feoffee at the day appointed, &c. And
some have said, upon the land so holden in morgage, because the
condition is depending upon the land. And they have said
that if the feoffer be upon the land there ready to pay the money
to the feoffee at the day set, and the feoffee bee not then there, then
the feoffor is quit and excused of the payment of the money, for that
no default is in him. But it seemeth to some that the law is con-
trary, and that default is in him; for he is bound to seeke the feoffee
if he bee then in any other place within the realm of England. As
if a man be bound in an obligation of 20 pound upon condition en-
dorsed upon the same obligation, that if he pay to him to whom the
obligation is made at such a day 10 pound, then the obligation
of 20 pound shall lose his force, and bee holden for nothing;
in this case it behooveth him that made the obligation to seek him to
whom the obligation is made if he be in England, and at the day
set to tender unto him the said 10 pound, otherwise he shall for-
feit the summe of 20 pound comprised within the obligation, &c.
And so it seemeth in the other case, &c. And albeit that some have
said that the condition is depending upon the land, yet this proves
not that the making of the condition to bee performed, ought to bee
made upon the land, &c., no more then if the condition were that
the feoffor at such a day shall do some speciall corporall service to
the feoffee, not naming the place where such corporall service shall
be done. In his case the feoffor ought to do such corporall service
at the day limited to the feoffee, in what place soever of England
that the feoffee bee, if he will have advantage of the condition, &c.
So it seemeth in the other case. And it seemes to them that it shall
bee more properly said that the estate of the land is depending

Dis. whether
tender shd be
on land or to
outgee. no
conclusion

order.

upon the condition, then to say that the condition is depending upon the land, &c. *Sed quære*, &c.

Co. Lit. 210. "*Item, sur tiel case de feoffment en morgage, question ad este demande, &c.*" Here and in other places, that I may say, once for all, where Littleton maketh a doubt, and setteth down severall opinions and the reasons, he ever setteth downe the better opinion and his owne last, and so he doth here. For at this day this doubt is settled, having beene oftentimes resolved, that seeing the money is a summe in grosse, and collaterall to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the later opinion, and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat, or twenty load of timber, or such like, the obligor or feoffor is not bound to carry the same about and seeke the feoffee, but the obligor or feoffor before the day must goe to the feoffee, and know where he will appoint to receive it, and there it must bee delivered. And so note a diversitie betweene money and things ponderous, or of great weight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient for him to tender it upon the land, because the state must passe by livery.

"*Deins le roialm d'Engleterre.*" For if he be out of the realme of England hee is not bound to seeke him, or to goe out of the realme unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition.

"*De tender,*" or *tendre*, is a word common both to the English and French, in Latine *offerre*; and in that sense, and with that Latyn word it is alwayes used in the common law.

LIT. § 342. And therefore it wil be a good and sure thing for him that will make such feoffment in morgage, to appoint an especial place where the money shall be payd, and the more speciall that it bee put, the better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon such condition that if A. pay to B. on the Feast of Saint Michael the Arch-Angell next comming, in the cathedrall church of St. Paul's in London, within foure houres next before the hour of noone of the same Feast, at the Rood loft of the Rood of the North doore within the same church, or at the tombe of Saint Erkenwald, or at the doore of such a chappell, or at such a pillar, within the same church, that then it shall be lawfull to the aforesaid A. and his heires to enter, &c., in this case he needeth not to seek the feoffee in an other place, nor to bee in any

Conclusion. & says settled, that tender must be to utgee, except in case of ponderous articles which must be in place appointed by utgee.

tender to feoffee.
ten des infes feoffor officiel
tender on land.

Need not follow out of utgee out of Eng. to tender.

Best to fix time & place of payment & so prevent having to seek utgee.

Payment before day, or at a dif. place on day, or in dif. articles, if accepted, is good. O.K. Clearly. Can't make utgees accept any of these.

But is prepayment more than a personal defense? If isn't, then a B.F.P. wd take presd of it. But unless utge secured a neg. note cd be no B.F.P. See Mass. case on card holding it a personal defense. Can't have B.F.P. of legal title to land utged as he knows it is merely to secure a non-neg. debt to which may be defenses.

Clearly the law. if plty was seeking a partial redemption.

If both C. & D., subsequent utgees, were before the Court each willing to pay his share, not so clear. But then they shd settle their rights between themselves & either alone or together they must offer utgee full amt. Seems no other case just like ours.

other place, but in the place comprised in the indenture, nor to be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.

§ 343. Also, in such case, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the same place so limited. But yet if he doe receive the payment in another place, this is good enough and as strong for the feoffor as if the receipt had beene in the same place so limited, &c.

Same as below

§ 344. Also, in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in ful satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if hee had received the summe of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in ful satisfaction.

Acceptation good. Rescission & satisfaction of new cont.

Note to this
↖

BURGAINE v. SPURLING, Cro. Car. 284 (King's Bench, 1633). *Ejectment.* All the Court agreed that whereas in the principal case the condition was for the payment of 1060*l.* upon the first of July, and the payment was made before the first of July, viz., upon decimo sexto Junii, and an acceptance thereof, it is a good performance of the condition.

Same principle as above.

TITLEY v. DAVIS, 2 Eq. Cas. Abr. 604 (Chancery, 1739). A. mortgages two estates, viz., Blackacre and Whiteacre, to B., and afterwards mortgages Blackacre to C. and after that Whiteacre to D. The question was, whether the Court can decree a redemption of B.'s mortgage, who was the original mortgagee, by proportionable contributions of C. and D., the two puisne mortgagees.

Redemption must be entire & not of a parcel only.

And LORD CHANCELLOR [HARDWICKE], after consideration, was of opinion that the Court could not decree such a redemption; that the original mortgagee ought not to be intangled with any questions that may arise among subsequent mortgagees; that he has a right to be redeemed intire and not by parcels; and his right undoubtedly stood so with regard to the mortgagor, and consequently with regard to the subsequent mortgagees; for the mortgagor could not hurt him by playing his right into another's hands, nor is there any precedent where such a redemption was ever allowed.¹

¹Street v. Beal, 16 Ia. 68 (1861); Coffin v. Parker, 127 N. Y. 117 (1891), and the authorities generally, accord.

16 Ia. - Ord. partial redemption.
127 N.Y. - " " " " But notes had im-
properly freed two lots from notes - held they
cd redeem on paying share due from re-
maining lots.

*But? in case in, can you have
Spec. perf. of agreement to permit
Earlier redemption? Held* BROWN v. COLE.

Entire ref.

at ant. Brou. Held HIGH COURT OF CHANCERY, 1845.

*Can't redeem before time set
due by paying int up to time* (14 Sim. 427.)

set. Bill to redeem a mortgage for a term of years made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-assign the mortgaged premises on being repaid the money lent on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer for the purchase of the premises shortly after the mortgage was made, tendered to the mortgagee the amount of the principal and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed; in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The VICE CHANCELLOR [SHADWELL] allowed the demurrer on the ground that it was contrary to the practice of the Court to decree the redemption of a mortgage before the day appointed for that purpose had arrived.¹

omit

GIBSON v. CREHORE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1827.

(5 Pick. 146.)

*One having a right
to redeem because
owning a part of
Equity - i.e. call
redeem man,
his part. He (here
evident having it to
do with)
must re-
deem all
I hold
Excess over
his share
as guar-
antee is
the other
interested
in the Eq.*

This was a bill in equity, in which the plaintiff, as widow of Abraham Gibson, claimed the right to be let into her dower in two parcels of real estate in Boston, in the occupancy of the defendant.

The bill alleges that on the 10th of July, 1816, A. Gibson died, leaving the plaintiff his widow; that he was then seised of the premises, subject to a mortgage to P. C. Brooks, dated November 18, 1814, to secure the payment of 15,000 dollars in two years with semiannual interest; that his estate was represented as insolvent, and that Brooks proved the debt before the commissioners of insolvency; that the assets of the estate were sufficient to pay 90

¹ Abbe v. Goodwin, 7 Conn. 377, 384 (1829), accord.

*7 Conn. - plain case, can't make out permit
redemption before due - not like case above
where agreement to that effect.*

(1) If case is correctly reported seems clearly wrong. & Agreements for pre-payment are no doubt O.K. (2) If case held that could not redeem until due when no agreement for prepayment then clearly O.K. That is all case in note is.

Err. Note case say shortly after note made tendered prin. & int. to April 1st. 1845. So tender apparently made before then.

cents on the dollar; that on the 26th of November, 1817, the premises were sold by the administrators, subject to the mortgage, and were purchased by the defendant; that the defendant, as a condition of the sale, gave his bond to the administrators to pay, take up, and discharge the mortgage as his proper debt, and that he entered under his deed from the administrators, which contained a stipulation that he should discharge the mortgage; that he afterwards, on the 8th of January, 1818, procured from Brooks an assignment of the mortgage and diverted the assets, holding the mortgage as a subsisting incumbrance, instead of discharging it according to his obligation. The plaintiff further alleges that, as to her, the assignment is inoperative and the mortgage discharged, or if not, that the assignment ought to stand for so much only as would remain due on the mortgage after deducting what the assets, if properly applied, would have paid. She further states that the defendant pretends that her rights, if she ever had any, were foreclosed by an entry under the mortgage on the 13th of February, 1818, and subsequent possession, but she avers that no such right of entry then existed in the defendant, he having before that time conveyed the estate by deed of mortgage to one Parker, and the assignment being inoperative, and that, if any such right did then exist, there has been no foreclosure, because at the time of the supposed entry the defendant was, and for a long time before had been, in the actual occupancy of the premises, having entered under his deed from the administrators; that the supposed entry was made in the absence of the plaintiff and entirely without her knowledge; that the defendant had never given her any notice of it, and that she was wholly ignorant, until shortly before the filing of her bill, that the mortgage was treated as having any force whatsoever, and that as soon as it came to her knowledge that it was set up by the defendant as a subsisting incumbrance, she offered to redeem and requested the defendant to state an account.

The defendant, in his answer, alleges that the plaintiff joined in the execution of the mortgage and thereby released her right of dower, and he denies that she is entitled to dower. He denies that the assets in the hands of the administrators should have been applied to the payment of the mortgage debt, or that he was bound to see to the application of the assets. He admits that he entered into a bond to pay, take up, and discharge the debt secured by the mortgage, so far as to save the intestate's estate harmless from the same, but denies that he engaged to release or extinguish the mortgage, and also denies that the administrators, in taking the bond, represented in any respect the plaintiff in her capacity of widow, or that the bond had any reference to her rights as widow. He al-

7: Means as-
set. of total
own not
used in
paying utge

for value see
Tot. next
page.

leges that about the 8th of January, 1818, for the sum of 16,540 dollars paid by him, he procured an assignment of the mortgage, and continued to hold it as a valid security for the original debt and interest, until it was foreclosed by virtue of an entry made by him on the 13th of February, 1818, in the presence of two witnesses, and a subsequent possession for three years; but that if the foreclosure cannot be sustained, the whole amount of the original debt, with interest computed semiannually, is still due to the defendant, after deducting such rents as he may have received beyond the amount of repairs. He alleges that at the time of his entry for foreclosure on the 13th of February, 1818, he had good right of entry for the purpose of foreclosing against all persons, except Parker, and that the mortgage to Parker, who never entered by virtue thereof, has been discharged.

The opinion of the Court was drawn up by

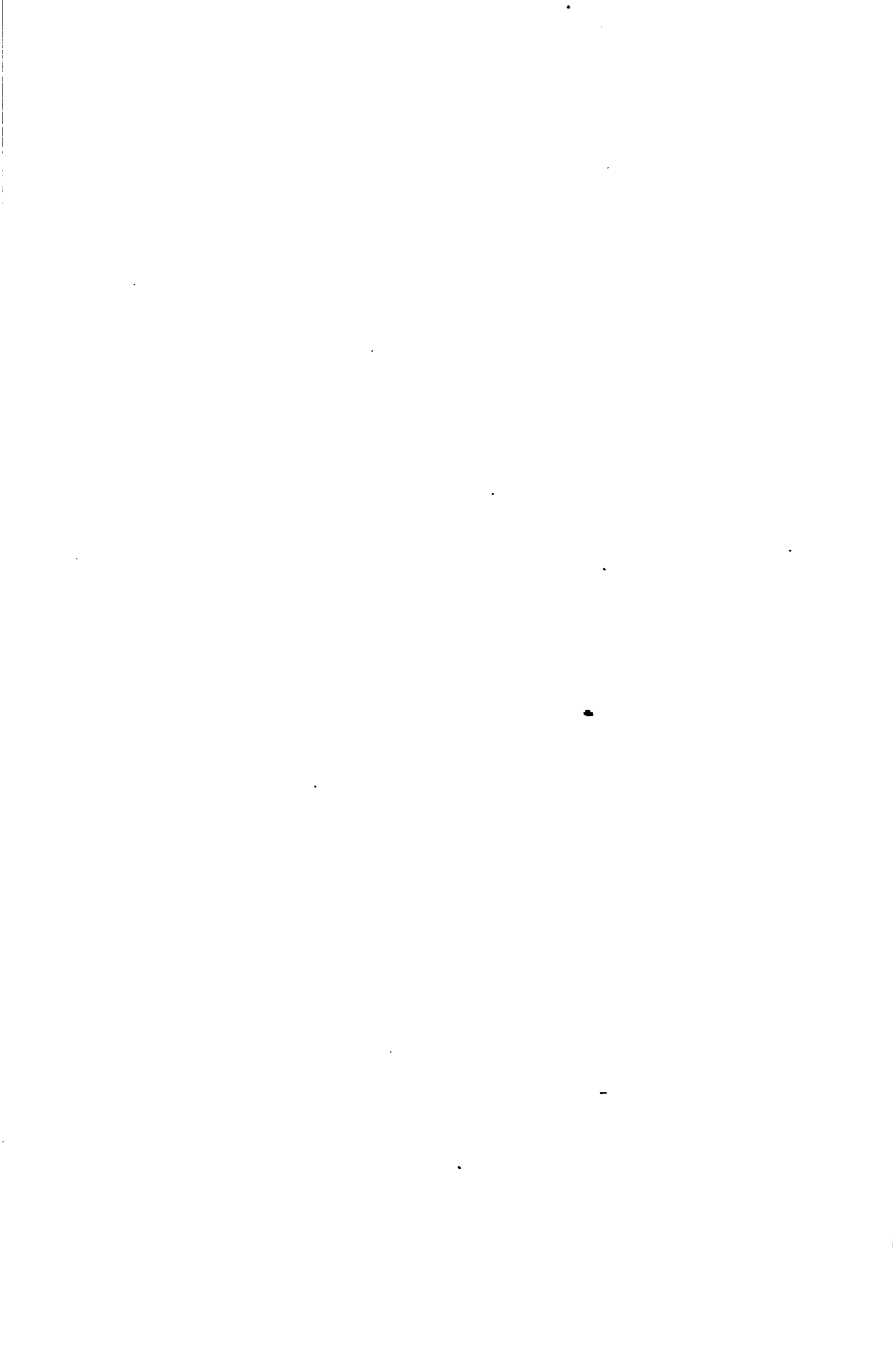
WILDE, J. That the widow of a mortgagor is entitled to redeem the mortgage is a necessary inference from the doctrine repeatedly laid down as the law of Massachusetts, that a widow is dowerable of an equity. It is a familiar principle in courts of equity, that every person interested in an estate mortgaged is entitled to redeem; and this principle is confirmed, if it requires confirmation, by St. 1798, c. 77, by which it is enacted, "that the mortgagor or vendor, or other persons lawfully claiming under them, shall have right to redeem." If therefore a widow can lawfully claim under her husband, of which there can be no question, she has a right to redeem, by the express words of the statute.

The objection, therefore, to the plaintiff's right to redeem is clearly unfounded, unless it can be maintained that a legal assignment of dower is an essential requisite to complete her title. It is true that before such assignment she cannot enter on any part of the land, for it cannot be ascertained in what part her dower will be assigned; nor can she maintain a writ of entry, for her legal right is inchoate. But an assignment of dower is not necessary to enable her to maintain a suit in equity for the purpose of redeeming the mortgage, because the assignment of dower does not affect her equitable right of redemption, and because she has no right to demand such assignment as against the mortgagee before she redeems the mortgage. Nor is an assignment of dower by the heirs necessary, because, as will be shown hereafter, she could not redeem a part or parcel of the mortgaged premises without redeeming the residue also, if required so to do by the mortgagee. The assignment of dower, therefore, is of no importance, and is not necessary to perfect her title to redeem the mortgage.

[The Court then proceeds to consider various objections to decreeing a redemption by the plaintiff, and holds, 1st, that the Court

*Read
ing in
full.*





has plenary jurisdiction to make such a decree; 2d, that the assignment of the mortgage to the defendant, when he was possessed of the equity of redemption, did not operate as a merger and extinguishment of the mortgage; 3d, that the plaintiff is not entitled to have the mortgage discharged out of the personal estate of the intestate; 4th, that the plaintiff, not being a party to the bond of indemnity given to the administrators, cannot take advantage of it; 5th, that the entry and possession of the defendant are not sufficient in law to foreclose the mortgage; and proceeds as follows:—

why? look up
use in cont

Considering, then, that the plaintiff's right to redeem is not extinguished by the defendant's entry and possession under the mortgage, we are to decide upon what terms and to what extent she is now entitled to redeem.

As the defendant has purchased the equity, as well as the mortgage, it would seem equitable to allow the plaintiff to redeem a third part of the mortgaged premises, by paying her equitable portion of the mortgage debt, according to the value of her right of dower as compared with the residue of the estate. But this cannot be done without infringing the defendant's rights as assignee of the mortgage. He stands in the place of the mortgagee, and has an undoubted right to insist on his whole debt. Nor can he be compelled to be redeemed by parcels, for by thus dividing the estate the income or value of the whole may be reduced. The rule therefore is, when several are interested in an equity of redemption and one only is willing to redeem, he must pay the whole mortgage debt; and the others interested in the equity, who refuse to redeem, are not compellable to contribute; for it would be unreasonable to compel a party to redeem, when perhaps it might be for his benefit to suffer the mortgage to be foreclosed. The mortgagee, however, is not to be entangled with any question which may arise between the owners of the equity in relation to contribution, but has the right to insist on an entire redemption. If, therefore, several estates are mortgaged by one mortgage, and the mortgagor afterwards conveys the estates separately to different persons, although each owner of the separate estates may redeem, yet it can only be allowed by payment of the whole mortgage debt. And the party so redeeming will be entitled to hold over the whole estate mortgaged until he shall be reimbursed what he has been thus compelled to pay beyond his due proportion. He is considered as assignee of the mortgage, and stands, after such redemption, in the place of the mortgagee in relation to the other owners of the equity. So if there be tenant for life and remainderman of an equity, either may redeem, but not without paying the whole mortgage. In like manner a dowress or jointress of lands mortgaged may redeem, she

paying the mortgage debt, and may hold over, if the heir refuses to contribute, until she and her executor shall be repaid with interest. (*Palmer v. Danby*, Prec. Ch. 137; *Saville v. Saville*, 2 Atk. 463; *Banks v. Sutton*, 2 P. Wms. 716; *Elwys v. Thompson*, 9 Mod. 396; 15 Viner, 447; *Ex parte Carter*, Ambl. 733; Powell on Mortg. 392, 708, 709, *in notis.*)

If the defendant had redeemed the mortgage, the plaintiff would have been let in by contributing her portion of the mortgage debt, according to the value of her life estate in one-third part of the mortgaged premises, in conformity with the rule adopted in the case of *Swaine v. Perine*, 5 Johns. Ch. Rep. 482. But as the defendant, being assignee of the mortgage, insists on the payment of the whole mortgage debt, the plaintiff cannot redeem on any other terms. After redemption, she will hold as assignee of the mortgage, but will be bound to keep down one-third of the interest during her life, and may hold over for the residue of the mortgage debt. The defendant must be held to account for the rents and profits from the time of his entry under the mortgage; for although this entry cannot operate by way of foreclosure, for want of notice to the plaintiff, yet it is sufficient to charge him with the reception of the rents and profits.

The case must be referred to one of the masters in chancery to take an account accordingly, and redemption will be decreed upon payment of the debt which remains due on the mortgage after deducting the rents and profits.

GROVER v. FLYE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1863.

(5 Allen, 543.)

WRIT OF ENTRY. The demandants claimed title under the levy of an execution by selling the equity of redemption of the premises.

At the trial in the Superior Court, before Lord, J., it appeared that at the time the levy was made the premises appeared on record to be subject to a mortgage to the Blackstone Loan and Fund Association, to secure certain sums of money, a portion of which was not then due; that full payment of said sums had been made and a discharge of the mortgage and release of the premises by the said association executed before the levy, but the discharge and release

Then payment must be the bill is not for two release of mortgage, reconveyance, or record.

So sale of eq/red. on ex execution after mortgage had been made. entry was bad.

cf 710 <

Take up her tender on the day.

(1) Here was payment at (in part) and before (as to later instalment) the day. Payment before may be treated as payment at the day unless levying creditors can be considered B.F. Ps. Hardly can as got no title to say, nothing of getting a legal title by their levy. Had their levy been effectual they wd only have gotten the Eq. redemp. Not trying to hold that as vs Equities against it. Anyway didn't get it. As far as not giving new value is concerned that is often covered by recording, acts placing conditions on same footing as B.F. Ps. But on first grd are not B.F. Ps. So payment before day same as payment on day.

(2) Payment on day passes legal title back. True if, as no doubt was true here since nothing said to contrary, mortgage ~~retained~~ was in pos. when payment made. If not in pos. he must re-enter to make Cond. Rebuy. put title back in him. (Cnd.)

If, as is usual in Eng., mtge is conditioned for a recovery and then title does not go back w. recovery and.

Obviously if payment on day vests title in title states it ^{extinguishes lien} ~~as~~ ^{as} lien states.

(3) So also tender on the day vests title in title states ^(Cnd.) & a fortiori discharges lien in lien states. Of course tender does not destroy debt but it is a perf. of the Cond. ~~so far~~ of the mtge so far as not prevented by mtgee & so gives mtgor his title back.

(4) Remaining question is one of the

Effect of the recording acts. In full report
the arg. of debt Counsel is given & he re-
lied solely on grd that mtge not really
discharged. So pt was hardly before Ct
& they said nothing as to it. Quite
commonly attaching & judgment Credit-
ors are within benefit of recording acts
and take free of unrecorded Equities,
Conveyances, &c. Tiffany, M. 1313, 1317.
Mass is accord. 129 Mass. 210. But
answer is that Judgment Creditor
knew of mtge & so had notice that it
might be paid off & so shd have
made inquiry whether it was or not.
Recording acts do not protect one who
from what he knows shd be put on
his guard. See Tiffany, § pp. 1090-91.
(5) Tho title has vested in mtgor he
is entitled to a formal discharge of
mtge to make his title clear.

were not recorded until afterwards; and that neither the judgment creditor nor the officer had actual or constructive notice of such discharge until the record thereof. The judge ruled that it was immaterial, for the purposes of this action, whether the mortgage upon the premises had been discharged, unless the creditor or officer had actual or constructive notice thereof before the seizure of the land on the execution, and that a sale of the equity without such notice was regular and proper.

The jury returned a verdict for the demandants, and the tenant alleged exceptions.

BIGELOW, C. J. It is admitted that the sums due on the mortgage to the Loan Fund Association were paid before the sale of the right in equity to redeem was made by the officer; and that these payments were made at or before the times when the several instalments became due according to the stipulation set forth in the condition of the mortgage and the bond which accompanied it and formed part of the transaction. By such payment, on familiar principles, the condition was saved and the mortgagor, the tenant, was in of his old estate. No conveyance or discharge of the mortgage was necessary to revest the estate in the mortgagor, or to defeat the title of the mortgagee. (*Merrill v. Chase*, 3 Allen, 339, and cases cited. *Joslyn v. Wyman*, ante, 62.) The argument, therefore, of the demandants, founded on the necessity of recording a release or discharge of a mortgage in order to defeat a title acquired by a judgment creditor by a sale on execution of a right in equity made after such release or discharge but without actual notice thereof, falls to the ground. The act of payment in the country *ante vel apud diem* saves the forfeiture of an estate held by a conveyance defeasible on a condition subsequent. No record of such an act is necessary to make the estate a fee simple estate in the grantor or mortgagor, as against all persons claiming by a subsequently acquired title. The release of the Loan Fund Association to the mortgagor was a useless and superfluous act, which added nothing to the strength of the title which he had acquired by a performance of the condition of the mortgage before a breach.

It follows that the title of the demandants under the sale of the right in equity to redeem the estate is invalid. The premises being unincumbered and held by the judgment debtor as an estate in fee at the time of the service of the execution, could be legally levied on only by an appraisement, and set off in the mode prescribed by law. (*Forster v. Mellen*, 10 Mass. 421. *Freeman v. M'Gaw*, 15 Pick. 82. *Perry v. Hayward*, 12 Cush. 344.)

Exceptions sustained.

But see (1901) 1 Ch. 945 contra where rule is that on payment rule is to recover.

omit.

In equity payment after default discharges the mgtg. (b) After Default.

EMANUEL COLLEGE v. EWENS, 1 Ch. Rep. 18 (Chancery, 1625).¹
That the Earl of Huntington, seised in fee of the Manor of North-Cabury, with advowson appendant, and for payment of debts by way of mortgage, 25 Eliz., made a lease for 500 years of the said manor, with appurtenances, not mentioning the advowson by express name, with a clause of redemption, and for advancement of learning and religion, of his free disposition in 28 Eliz. by deed granted the said advowson to Sir Francis Hastings, and others, and their heirs, to the use of the said Earl for life, remainder to the Master, Fellows, &c., of the said college, and their successors forever; and shortly after in the same year paid his said debts. And this court conceived the said lease, being but a security, and that money paid, the said lease being void, as well against the said college as against any other; and though the money not paid at the day, but afterwards, the said lease ought to be void in equity as well as on a legal payment, it had been void in law against them.

cf. M. v. H. 706.

omit.

Tender after default is good & prevents mgtg. getting int. after tender.

by way of mgtg.

MANNING v. BURGESS, 1 Ch. Cas. 29 (The Rolls, 1663). A mortgage was forfeited; the mortgagor afterwards meeting the mortgagee, said, "I have moneys; now I will come and redeem the mortgage." The mortgagee said to him he would hold the mortgaged premises as long as he could; and then when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there; but it did not appear that the mortgagee was within, or that the tender was made to him; and it was decreed a redemption, and the defendant to have no interest from the time of the tender, because of his wilfulness.

A like case between *Peckham* and *Legay* about a year since.

omit.

Like case above except says tender must be kept good.

LUTTON v. RODD, 2 Ch. Cas. 206 (Chancery, 1675).—A deed in the nature of a mortgage and covenant to reconvey on payment: the money was tendered at the day and place, and re-

¹A portion only of the case as reported is here given.

(1) This case is certainly sound whether tender be when due or ~~after due~~ ^{after due in con.} ~~not clear from case which it was~~. If it was when due, then the utgee would usually not need any time unless recovery -
ance nec. If nec., as usually is in Eng., then it shd be shown utgee several days before due so that he can be ready on day to execute it. If after due then utgee shd have reasonable time after notice to determine amt due & other matters. Tender wd not stop int. until this time elapsed.

(2) Seems that tender can be made tho' disputes as to int. or costs due. Utgee at his peril must tender enough. Found no case where utgee in pos. & l^y of profit - tot. nec. Seems then case might be thought to come under rule that can't tender where unliq. dam. due, unless tender all claimed. Even then however some sts allow tender tho' tenderer at his peril making it large enough.

fused: Deceed, the money without interest from the time of the tender, and to reconvey, though that the plaintiff ought to make oath that the money was kept and no profit made of it.¹

Take this case ^{and} ~~but~~ in section after 698 (ht).

In order for a tender to stop int. utgor must show that he had previously given notice time to ex aequo release

WILTSHIRE v. SMITH.

HIGH COURT OF CHANCERY, 1744.

(3 Atk. 89.)

A bill was brought to redeem a mortgage on the 8th of May, 1742, in which the plaintiff insists upon a redemption on paying the principal money only, for that the interest ought to end the 20th of February, 1741, because the plaintiff had given six months' notice to pay off the mortgage, and on that day tendered the principal and interest and a deed of assignment, but the defendant absolutely refused to take the money.

The defendant swears that he offered to take the money, provided he might have time to consider of it and to advise upon the deed of assignment, as there are covenants in it on his part, upon which, as he is not of the profession of the law himself, it is reasonable he should ask the opinion of some attorney, whether they were such as he might safely execute.

LORD CHANCELLOR [HARDWICKE]: There is not one case in twenty upon the fact of an absolute refusal after a tender that is ever made out, for they are generally attended with circumstances that explain the refusal, and are nothing more than causes cooked up by country attorneys to make themselves business. The plaintiff did not, as he ought to have done, send a draft of the assignment to the defendant any time before the money was tendered.

The plaintiff insists that the defendant absolutely refused to take his money or execute the deed of assignment. If this had been the fact, it would have been unconscionable and unreasonable in the defendant.

But the person who was to take an assignment of the mortgage swears that the defendant desired further time or to that effect. The question is, Who was in the wrong? The plaintiff certainly was. For where there are covenants on the part of the mortgagee, it is very reasonable that he should have some time to look them

¹Gyles v. Hall, 2 P. Wms. 378 (1726), Stow v. Russell, 36 Ill. 18 (1864), and the authorities generally, accord.

2 P. Wms.

36 Ill. 18, 34.

Didn't stop int because not kept good. See. that to stop int must be kept good. No reason. Held (1904) that if not kept good, ptg was in default & could not have spec. perf.

of utgor to see if correct fil. In full ref. to a note says that had been default on utgor. ? if right. then did 6 mns notice. Come up? Under Eng. rule that after default must give 6 mns notice to redeem. In Corte, 7th Eng. 728.

over; and the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have an opportunity to advise upon it, and the plaintiff's attorney should have appointed a time to pay the money after the defendant had been allowed a sufficient time to advise; or, as I said before, he should have sent a copy or the ingrossment of the assignment.

But the subsequent transaction and what passed before the filing of the bill explains it. Did ever a mortgagor, as is the case here, after he was put under this difficulty, lie by a year and quarter without bringing a bill to redeem? What could be the reason? Why, the plaintiff, the mortgagor's attorney, told him, You have made a tender of your mortgage money, and the defendant's refusal has forfeited his interest; for that you may keep the money, and by a bill compel the defendant to take the principal, without interest, from the time of the tender.

LORD HARDWICKE ordered that it be referred to a master to take an account of what was due to the defendant for principal, interest and costs on the mortgage, and on the plaintiff's paying to the defendant what the Master shall certify to be due within six months after he has made his report, it was decreed the defendant should assign the mortgaged premises, as the Master should direct; but in default of the plaintiff's paying as above directed, it was ordered the plaintiff's bill do stand dismissed.

Oruit

MAYNARD v. HUNT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1827.

(5 Pick. 240.)

Writ of Entry. The defendant declared upon his seisin in fee and in mortgage and a disseisin by the tenant.

The tenant pleaded: First, *nul disseisin*.

Secondly, that Nathaniel Maynard, the mortgagor, assigned the premises to the tenant, with warranty against all incumbrances, and that the tenant, after condition broken, but before action was brought, tendered \$400 for the discharge of the mortgage. The demandant took issue on the tender.

Thirdly, that in consideration that the tenant would forbear to make the tender, the demandant promised that the tenant should hold the land discharged of the mortgage, and that he (the de-

*Tender after de-
fault (unless ac-
cepted possibly)
does not discharge
mortgage but only
entire q. in. entred
as it to file a
bill in Eq.
for relief.
So proof of
an unac-
cepted tender
is no bar
to a writ
of entry
to fore-
close. Sup.
dept must
go into eq.*

mandant) would resort to Nathaniel Maynard for payment of the note, which was secured by the mortgage. Issue was taken on this plea.

Fourthly, a plea like the second, except that it alleged a tender of \$450. Issue was taken on the tender.

The cause was tried before Putnam, J., and a verdict was found for the tenant upon all the issues.

The demandant thereupon moved in arrest of judgment, because the three last issues were immaterial, and the first issue was found only for form's sake and as a consequence of the finding on the other issues.

He further moved that if any of these three issues should be adjudged immaterial the Court would grant a new trial, because no evidence had been introduced sufficient or proper to maintain either of them on the part of the tenant, and because all the evidence in the case, the three last pleas and the admission of the tenant's counsel show that the finding of the first issue for the tenant was a consequence of finding the other issues in his favor, and that, if that issue had stood alone, it would have been found for the demandant.

At the trial J. W. Hunt, the brother of the tenant, testified that, at the tenant's request, he called on the demandant and inquired how much was due upon the note. The demandant replied \$400. The witness asked him if he intended to call upon the tenant for the land, if Nathaniel Maynard (who was the defendant's son) should be unable to pay the note. He answered in the affirmative. The witness said he would pay him \$400; that he came for the purpose of settling with him; that he had the money with him in bank bills, and that he would get the specie if it would make any difference. The demandant said it would not. He also said that if he took the money the tenant would immediately sue Nathaniel. The witness told him that he could expect nothing else. The demandant then said that he would not take the money; he would rather it should lie as it was on interest; he was secure; but he assured the witness that his brother should not be hurt.

The question whether this evidence was sufficient to warrant the finding of the jury was reserved for the determination of the whole court.

PARKER, C. J. It is very clear that all the issues except the first are immaterial, and that the first was found for the defendant against all the evidence in the case which could legally bear upon it. The mortgage deed produced by the demandant entitled him to a verdict on the first issue, there being no payment or tender of payment of the money due, according to the condition, until

*P. the common
law of A. S.*

See our dante

*note in P
scope of
mel dis.*

four years after the condition broken, so that the demandant's title at law was perfect, subject only to be defeated by a process in equity, founded upon payment or tender of payment after condition broken and before foreclosure.

If judgment should be rendered on the verdict in favour of the tenant, the demandant would be entirely deprived of his security and probably of his debt, without any consideration or equivalent, for we cannot consider that the loose conversation testified to by the brother in regard to his claims has proved any intention to give up his security, or that it can have the effect of a release or discharge of the mortgage in law or in equity.

Whether a tender or any fact equivalent was proved is wholly unimportant, as the tenant's right at that time subsisted wholly in equity, and he could not otherwise enforce it than by a bill in equity. The tenant's counsel has reminded us since the argument that no objection was taken at the trial to the time of the supposed tender, and he refers us to the case of *Arms v. Ashley* (4 Pick. 71) to show that it could not afterwards be raised. But the cases are wholly different. In the case cited the point was that a fact capable of proof, but omitted to be proved or called for at the trial, was, on the hearing of the questions reserved, stated as a ground of objection to the verdict. In his case the point on which the cause turns appears on the record and in the proceedings, and, from the tenant's own showing, no other evidence touching it could have been produced had the question been made at the trial, for the tenant's right to tender it did not exist until long after the tender could have defeated the demandant's title at law. Admitting that payment tendered and received after condition broken and before foreclosure would be a sufficient defence to an action brought by the mortgagee for possession, it would not follow that a tender not accepted would be. The first might operate as a discharge of the debt and waiver of the breach of the condition, and it might be unreasonable to allow the mortgagee to recover possession, when, by another suit, he would be immediately obliged to surrender it. But the case of a tender is different. The debt is not discharged, and it is only in equity that the mortgagor can avail himself of it.

Ed. Waiver of mort.

The proper course in this case is for the plaintiff to recover the conditional judgment, as in the case of mortgage, unless the tenant has a better defence than is shown by the report of the case.

*Verdict set aside and new trial granted.*¹

¹ *Rowell v. Mitchell*, 68 Me. 21 (1876), accord.

(1) When lands are extended it means in Ohio that they are given cond. to hold until rents & profits pay debt. Used before buy on land possible.

(2) That payment after default does not vest title in title junior is genl rule. But some states ^{Contrary} incident follows debt ^{on the ground of cond. is waived}. Also some statutes ^{Contrary}.

With regard to chattel mortgage has more often been held that does vest on arg. that br. of cond. waived. Court in our case assumes waiver theory will p. 711.

(3) ~~As for~~ ^{Of course title to chattel can be conveyed} But in lien states pay after default is genlly held to discharge mortgage. ^{Waiver of cond. is the} ^{ground} ^{as a} ^{ground} ^{for} ^{that reason seems} ^{poor.} Has there been suff to surrender lien? ^{See} Sec. 3 of St. of Inds requires a writing unless is surrendered by operation of law. About only way to support cases is to say that incident follows debt ^{as a matter of law. & so} ^{tendency in lien states to always adopt this idea.} not within St. Inds. ^{Whether legal} lien is retained or not is usually immaterial as wd give mortgage practically no rts. & so nearly all cases are dicta. Go on grd that lien falls with debt. Seems clearly O.K.

(4) But can mortgage avail himself of the bare legal title he has in most title states? Ct. implies that he can: that he can defeat mortgage seeking pos. & recover pos. vs. mortgage tho' if errone ed not foreclose by writ

Deft sold pt of an Egrd. Deft had bought it at a Sheriff's sale which pt claim was

STEWART v. CROSBY. *is valid & so pt's sale, to recover back what he pd. Deft was*

SUPREME JUDICIAL COURT OF MAINE, 1863.

(50 Me. 130.) *cur detor. of one Hanson & said attached on Egrd which H then owned.*

This was an action of assumpsit to recover back money paid to the defendant for his release of an equity of redemption of certain premises, which the defendant represented to the plaintiff he had purchased and owned.

At *Nisi Prius*. Tenney, C. J., for the purpose of giving progress to the cause, ruled upon certain questions of law, and a verdict by consent was taken for the plaintiff for a sum agreed upon by the parties. The questions raised by the defendant's exceptions, and the facts in the case, sufficiently appear from the opinion of the Court.

The opinion concurred in by a majority of the Court was drawn up by

DAVIS, J. The defendant, having claims against one Charles Hanson, commenced suits thereon, and caused his right of redeeming certain real estate, previously mortgaged by him, to be attached, September 15, 1848. Judgments were recovered February 17, 1854; executions were issued March 17, and Hanson's right of redemption seized thereon the same day; and, on April 22 of the same year, the officer duly sold to the defendant all of Hanson's right to redeem which he had at the time of the attachment.

October 23, 1854, the defendant sold to the plaintiff, by a quit-claim deed, "all the right, title, and interest acquired by him by virtue of his deed" given to him by the sheriff upon the sale referred to. The plaintiff, upon inquiry, afterwards ascertained that Hanson, after the attachment, and before the seizure of his right of redemption upon the executions, had fully paid the mortgage debt. But the mortgage had not been discharged, either by an entry upon the record or in any other manner.

The plaintiff claims that such payment was itself a discharge of the mortgage, so that Hanson's title was no longer a right of redemption, which could be sold by the sheriff, but a fee, upon which the execution should have been extended. And he has brought this suit to recover back the purchase money, on account of the failure of title.

The defendant does not concede that the plaintiff would be entitled to recover, if there was a failure of title, as he has alleged, as he gave a mere release, with no covenants of title. But he contends that the mortgage was not discharged by payment merely;

Butw attach ment & levy sale H pd the judge has overruled. Fee simple can't be sold in levy int must be extended. (Held for deft. He did not have the fee simple. The court still held it to be on a valid trust. In U.S. payment when due must title but not pay after due. But after payment only has Egrd.

and that, if the mortgage debt had been paid, it was a benefit, and not an injury, to the plaintiff.

In the case of *Martin v. Mowlin*, 2 Burrow, 978, Lord Mansfield is reported to have said, "a mortgage is a charge upon the land, and whatever would give the money will carry the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts. It will go to executors. . . . The assignment of the debt, or the forgiving it, will draw the land after it, as a consequence, though the debt were forgiven only by parol," &c. The case under consideration was a suit at law; and the confounding of principles of law with those which prevail in equity, only, is probably due to the reporter, whose language it is. For he admits, in publishing his notes of cases, that he did not always take down the restrictions with which a proposition was qualified, "to guard against its being understood universally, or in too large a sense." (1 Burr. 9.)

It is worthy of notice that in that case, as generally in English mortgages, the condition was that, upon performance, the mortgagee should reconvey the premises, and not, as in this country, that the deed should be void. It would seem, therefore, to be certain that payment on the law day would not have revested the title in the mortgager without such reconveyance. *Harrison v. Owen*, 1 Atk. 526; 2 Cruise (London ed.) 110. Upon mortgages to be void upon performance, such as are usually given in the United States, it is everywhere conceded that payment before condition will divest the mortgagee of his title, without reconveyance, or other discharge. (1 Washburne on Real Prop. 543; *Whitcomb v. Simpson*, 39 Maine, 21; *Holman v. Bailey*, 3 Met. 55.)

In this country there has been a constant tendency to apply the views attributed to Lord Mansfield indiscriminately, at equity and in law. Sustained by such jurists as Chancellor Kent, Judge Story, and Mr. Greenleaf, it is not strange that the weight of authority should turn in that direction. But in Maine, Massachusetts, Connecticut, and in several other States, the old doctrines of the common law still prevail. Though in equity the mortgage is an incident, and the debt the principal thing, at law the mortgage is a conveyance of the title, to be defeated upon a condition subsequent. Unless thus defeated, the legal title is in the mortgagee. He may assign the debt without the mortgage, in which case he holds the mortgage in trust for such assignee. Or he may assign the mortgage without the debt, or the mortgage to one and the debt to another, the owner of the mortgage always holding in trust for the owner of the debt. So that the assignment of the debt operates as the equitable, but not as the legal assignment of the

of entry. No doubt that was early law
in Mass. & Me, Conn. N.H. & possibly else-
where. But likely today he cannot
use his legal title at all. The later
cases at law even seem to tend that
way. If that is the law - then the
dist. betw. lien & title jurisdiction be-
comes pretty thin. Rule of our case
unimportant as now land can be
levied on whether for or eg. redemption.

mortgage. And payment of the debt, after condition broken, does not divest the mortgagee of his legal title; but the mortgager must resort to equity for a release, or a reconveyance. These principles, though extensively denied in this country, are sustained by so many decisions in the States before referred to that it is unnecessary to cite them (1 Washburn, 553; 1 Hilliard on Mort. 476.)

Mr. Greenleaf collects the authorities in the first volume of his edition of Cruise, and in support of the opposite doctrine suggests that the acceptance of payment, after condition broken, is a waiver of the condition, and has the same effect as a performance of it. (1 Greenl. Cruise, 595.) But this is more specious than sound. A waiver of the condition may operate to confer the same rights as a performance of it. This is the case in regard to bonds for the conveyance of real estate. But it does not follow that such a waiver can operate, by our laws, to convey or release a legal title to real estate. It cannot do so, in the case of a mortgage, any more than of a bond. So that this theory, like all others in support of the doctrine, rests upon a denial that the mortgagee has the legal title, until after foreclosure.

And on
waiver
seem so.

But another answer to it is, that such an acceptance of payment is not a waiver. A waiver is a voluntary relinquishment of some right. But the mortgagee relinquishes nothing in such a case. The mortgager pays it as a matter of right; and it is not at the option of the mortgagee whether it shall be paid or not, until the right of redemption expires. A receipt of payment after that would be a waiver of the forfeiture; but before forfeiture the mortgager, by payment, acquires a right to a release, or a reconveyance, not on the ground of waiver, but of contract, and of law.

not being
satisfying any.
OK. With does
only what he
must do. That
can't be waiver.

But though it is well settled in this State that upon payment after condition broken, the legal estate remains in the mortgagee until it is released, so that the mortgager cannot maintain a writ of entry against him; it is equally well settled that, in such case, the mortgagee, not being in possession, cannot maintain such an action against the mortgager. (*Hadlock v. Bulfinch*, 31 Maine, 247; *Williams v. Thurlow*, 31 Maine, 392.) The reason assigned for this is that, by our statutes, in all actions upon mortgages, there must be a conditional judgment; and, if the debt has been paid, so that there cannot be such judgment, the demandant cannot recover at all. (*Wade v. Howard*, 11 Pick. 289; *Webb v. Flanders*, 32 Maine, 175; *Gray v. Jenks*, 3 Mason, 520.) Where there is no provision of statute to prevent, as in an action of forcible entry and detainer, it has been held that a suit for possession may be maintained by the mortgagee, after payment. (*Howard v. Howard*, 3 Met. 548, 557.)

Grp.

The mortgagee, after such payment, holds but a naked trust, without any interest. As in other like cases of holding in trust, he can derive no benefit from it, and can convey no title except as subject to it. And the estate cannot be taken for his debts, though it can be taken for the debts of the *cestui que trust*. As the mortgagee's title in such case is of no value, there can be no motive for transferring it to a third party; and therefore it is seldom done in this country. That it may be done would seem to admit of no doubt. (*Dudley v. Cadwell*, 19 Conn. 218.) Such a deed, says Wilde, J., in *Wade v. Howard*, before cited, conveys "the legal estate, or a satisfied mortgage; such an estate as is frequently purchased in England to be tacked to a subsequent mortgage." Numerous cases of this kind may be found cited in the English editions of Cruise, vol. 2, c. 5, which Mr. Greenleaf has omitted, because the doctrine of tacking mortgages does not prevail in the United States.

There is no difficulty in applying these principles to the case at bar. When the executions against Hanson were issued he had paid the mortgage debt, but the mortgage itself had not been discharged. If the payment had been before the condition had been broken, that would have revested the estate without any discharge; and there would have been nothing to seize on the execution. (*Grover v. Flye*, 5 Allen, 543.) But payment after breach of the condition had no such effect. His interest in the premises was clearly liable to be seized on the executions; and the only question is, how should the levies have been made—by a sale, or by an extent?

If, at the time of seizure upon the executions, there had been not only a payment of the mortgage debt, but a release of the mortgage, recorded in the registry of deeds, then there could have been no sale of an equity of redemption, though the mortgage was in force at the time of the attachment upon the writs. (*Foster v. Mellen*, 10 Mass. 421.) In *Pillsbury v. Smyth*, 25 Maine, 427, the report of the case does not show whether the discharge of the mortgage had been recorded. And we need not determine whether, if there is a release, but not on record, the officer may not proceed as if none had been made. For in this case no release had been made, either upon the record or otherwise.

By the R. S., c. 90, § 14, "when the amount due on a mortgage has been paid to the mortgagee, or person claiming under him, by the mortgager, or the person claiming under him, within three years" from proceedings for a foreclosure, "he may have a bill in equity for the redemption of the mortgaged premises, and compel the mortgagee, or person claiming under him, to release to him all his right and title therein." And, by c. 76, § 29, "rights of redeeming real estate mortgage may be taken on execution and sold."

(1) Clear that in title states if payment after default doesn't reset title tender will not. So ^{some of} ~~the~~ contra at end of case. ~~states~~ which are from title states are hardly contra. If a title state holds that payment after default resets title then as to this matter it becomes quasi-a lien state.

(2) Two possible arguments vs case:

(a) Tender must be kept good to be effectual.

(b) Unfair to creditor as doesn't know ~~if~~ exact amt due, & if accepts amt. offered ^{tho' too small} that will be accord & satiation in many cases. So where claim unliquidated. ~~or~~

(3) As to argument (a). i. Rule is that must be kept good to stop int & costs. O.K. as if ~~creditor~~ ^{debtor} has use of money no great injustice in making him pay int. If however he keeps tender good & so loses use of money he shd not pay interest. If tender is not kept good & cred. ^{the} demands money, ~~then~~ is refused, & then seems obviously debtor shd pay costs. Where no demand not so clear but costs have gone along with int. ii. But a tender not kept good discharges sureties. O.K. Cred. must not injure surety. If repays money when he ed have gotten evidently cred. shd take risk. iii. Then we come to effect of tender not kept good on liens. In case of pledges clear that discharges goods. Probably true of strict liens. Then as to uterge liens. Seems indistinguishable from pledges & ordinary

It was just such a right of redeeming a paid mortgage which Hanson owned when it was seized on the executions. The same title passed by the sale that would have passed by an extent. The defendant therefore conveyed a good title to the plaintiff; and the latter, having suffered no loss, is not entitled to recover.

Whether, if there had been no right of redemption in existence when the plaintiff purchased of the defendant, he could recover back the consideration paid, on the ground of a mutual mistake of fact, is a question which becomes immaterial. See the case of *Earle v. De Witt*, with the able dissenting opinion of Merrick, J., 6 Allen, 520.

Exceptions sustained. Verdict set aside.

WALTON, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

APPLETON, C. J., and CUTTING, J., concurred in sustaining the exceptions for another cause.¹

Foreclosure. Debt had made a sufficient tender but did not show that he had kept it good or bring money into Ct. Held a bar nevertheless. Tender discharged after default.

KORTRIGHT v. CADY. all Collat. advantages such as int. lien

COURT OF APPEALS OF NEW YORK, 1860.

(21 N. Y. 343.)

ret. then tender discharged judge tho' simple debt cd.

Appeal from the Supreme Court. Action to foreclose a mortgage.

The defendant Cady was a subsequent grantee of the equity of redemption. He averred in his answer, and proved on the trial, that, after the money secured by the mortgage had become due and the stipulated day for payment had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes upon the mortgaged premises, which the plaintiff had discharged. It was held that Cady was, for reasons unnecessary to be stated, under no obligation to pay the taxes, and the case stood upon the naked tender. Cady did not in his answer allege a readiness still to pay the mortgage debt, or that it was paid into court, nor did he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good.

The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Upon appeal by the defendant Cady,

¹ The opinion of Appleton, C. J., in which Cutting, J., concurred, is omitted.

still is col- lected. Rule dis. at C.G. means then judge had till not merely a lien. the judge dis.

this judgment was affirmed at General Term in the First District; whereupon he appealed to this Court.

COMSTOCK, Ch. J.¹ After the suit was commenced to foreclose the mortgage, Cady, who had become the owner of the land, tendered the amount due, with the costs, which being refused, he set up the tender in his answer, in bar of the further maintenance of the action. The only question in the case is, whether a tender, made after a mortgage is due, by the owner of the lands mortgaged, discharges the lien.

Forty years ago this question was fully determined by the Supreme Court of this State, in the case of Jackson v. Crafts, 18 John. 110. Mr. Justice Woodworth, in delivering the opinion of the court, observed: "From the nature of the interest the mortgagee has, there is no necessity of a reconveyance by him to the mortgagor after the mortgage has been paid. When that is done, the mortgagee has no title remaining in him to convey, and consequently, by our laws, on payment of the money he is not deemed a trustee, holding the legal estate for the benefit of the mortgagor. The only question, then, is, whether tender and refusal are equivalent to payment." Having thus truly stated the relation between mortgagor and mortgagee, according to the law as it was then and has been ever since well settled in this State, he cited some of the early English authorities, holding that a tender of the money due discharged the land from the lien.

Nearly twenty years after this decision was made, the same question again arose concurrently, or nearly so, both in the Court of Chancery and the Supreme Court. The case in each of those courts originated in the same transaction, which was this: In 1823, one Edwards mortgaged land in Buffalo to the Farmers' Fire Insurance and Loan Company in New York. The company foreclosed that mortgage in Chancery in 1833, and at the sale under the foreclosure Tibbetts, their president, purchased a portion of the lands for the benefit of the company, so that the company was deemed the real purchaser. In 1835 they entered into a written contract with W. T. and Isaac Merriitt, whereby they agreed to sell to them the land so purchased, and the Merriitts paid a part of the price agreed on. By a clause in the charter of the company, it was declared that when the corporation became the purchaser of any land mortgaged to them the mortgagor should have the right of redemption of such lands on payment of principal, interest, and costs, so long as the same should remain in the hands of the corporation unsold. After the company made the said contract of sale to the Merriitts, Edwards, the mortgagor, claiming that the lands in question still re-

¹The order of the opinions has been changed.

*Doubt this
opinion*

*Dis. of earlier
Cases in N.Y.*

*OK in
N.Y.*

*1/2 E.g. no
doubt, or
law
on day*

See 715 ←

liens. No such equity requiring it to be kept good as in case of interest. But not like surety case either as cred. has over any duty to land utged (real surety) to take money. If was land of a 3rd party that was utged then dif. So far as wife's down is concerned it should be released from utge by a tender. Creditors seeking to buy, houses, are not like surety utgor or wife & so must stand simply on its of their debtor. Not surprising that cases have divided. Little argument either way except technical one that tender destroys Collat. advantages but not debt. Since debt still exists lien can exist of course.

(4) As to argument (b). Seems un-sound. When consider i. that Creditor has a reasonable time to investigate. ii. that he need not accept it as full payment & if debtor makes that a cond. it makes his tender conditional & so bad.

mained in the hands of the company unsold, tendered to them the amount of the mortgage debt with interest and costs, and demanded a release or reconveyance of the premises. The tender and release being refused, he brought ejectment against the company in the Supreme Court. (*Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467.) The controversy in Chancery was upon a bill filed by the Merritts to enforce the specific performance of a contract with one Lambert for the exchange of the same lands for other real estate in the city of New York; and the question was, whether they could make title to the said lands in Buffalo. Before filing that bill, the heirs of Tibbetts had conveyed to the Merritts in pursuance of the contract of the company; but that conveyance was given after the above-mentioned tender. (*Merritt v. Lambert*, 7 Paige, 344.) The question of title in both of these controversies depended on two considerations: First, did the lands remain in the hands of the company unsold, notwithstanding the contract to sell them to the Merritts? Second, if so, then did the tender by the mortgagor discharge the lien of the mortgage?—it being, of course, conceded that, under the said clause in the charter, the right to pay off or redeem the mortgage existed notwithstanding the foreclosure and purchase by the company. The Chancellor was of opinion that the contract with the Merritts was in effect a sale to them, which cut off all the rights of the mortgagor; in other words, that, by reason of that sale having been made, the saving clause in the charter had no effect. He was also of opinion that if the right to redeem was still left in the mortgagor, a mere tender unaccepted did not discharge the lien.

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In giving his views upon the last mentioned question, the Chancellor criticised the opinion of Judge Woodworth in *Jackson v. Crafts* (*supra*), for the reason that the English authorities which he referred to related to a tender on the day when the mortgage debt became due. (Bac. Abr., tit. Tender, F.; Co. Lit., 209 b, § 338; 20 Viner, tit. Tender, N., § 4.) On this criticism I shall make one or two observations. By the ancient common law, a mortgage was a grant of land defeasible on the condition subsequent of paying the money at the exact time specified. (1 Powell on Mortgages, 4.) On failure to perform that condition the grant was absolute, and neither tender nor payment made afterwards could have the effect to revest the title. The specified time of payment was called the law day, because after default the legal rights of the mortgagor were gone. The estate became vested in the mortgagee absolutely, because the original grant was freed from the condition. "For these reasons," the Chancellor himself remarked, "it is, that the mortgagor, or his assigns, or subsequent incumbrancers upon the

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mortgaged premises, are driven to a bill to redeem, where the mortgagee refuses to receive what is equitably due to him. But this could not be necessary," he added, "if a mere tender of the amount due after the mortgage has become forfeited would have the legal effect of discharging the mortgaged premises from the lien of the mortgage." It is a self-evident proposition, which the Chancellor need not have undertaken to prove, that when the law was that even payment after the law day would not discharge the mortgage, a mere tender could not have such an effect. He was probably quite correct in saying that the English authorities cited by Judge Woodworth referred to tender at the day, because those authorities were of a date when even payment after the day did not divest the estate or interest of the mortgagee. But Judge Woodworth and the eminent men who sat with him on the bench of the Supreme Court considered, what the learned Chancellor seems to have failed to notice, the fundamental change which the law of mortgage had undergone long before the decision in *Jackson v. Crafts* was pronounced. In this State, a mortgage had always been regarded as a mere security or pledge for the debt; and the rule had always been that payment at any time discharged the lien, so that no reconveyance of the estate was necessary. It seems to me, therefore, that the authorities cited by the Supreme Court, on the effect of tender, were extremely pertinent to the question, because they showed very conclusively that a tender at the law day had the same effect on the mortgage as a payment on that day. Underlying this particular proposition, of course, was the more general doctrine that when a certain effect must be given to a payment, a tender will have a like effect. This was what the Supreme Court undoubtedly meant, and the authorities cited simply showed the application of the principle to the law of mortgage. The principle itself, or its application, was not questioned by the Chancellor; but he did not consider, so far as appears, that the rule had become entirely settled, giving to a payment after the day and on the day precisely the same consequences. I think, therefore, with great respect for a jurist so learned and accurate, that he differed from the Supreme Court, and criticised its opinion, without due reflection upon the real ground of the decision.

I turn now to the controversy which arose concurrently in the Supreme Court, and directly presented the question for the second time in that court. (*Edwards v. The Farmers' Fire Insurance and Loan Company, supra.*) At the trial the Circuit Judge had ruled in favor of Edwards, the mortgagor, upon both the points above stated. That is to say, he held that, notwithstanding the contract of sale to the Merritts, the lands in question still remained in

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the hands of the company unsold, and that the tender after the law day extinguished the lien of the mortgage, the foreclosure itself having no contrary effect, according to the express provision of the charter. The plaintiff had a verdict accordingly. A new trial was moved for in the Supreme Court and denied,—the opinion of the court being delivered by Mr. Justice Cowen, who examined both these questions, and especially the one now presented to us, at great length and with great ability. In the course of the discussion he also spoke of the provision in the charter as an extension of the law day; but to that consideration I think only small importance should be attached, for the charter only extended the “right of redemption,” in other words, the right to pay off the mortgage, leaving the effect of an unaccepted tender to depend, as it did before the foreclosure, upon general principles of law. If the concurrence of Chief Justice Nelson had been placed on this special and narrow ground, undoubtedly he would have so stated. Mr. Justice Bronson dissented from the conclusion; but whether on the ground that the executory sale to the Merritts had cut off all the rights of the mortgagor, or on the ground that a mere tender does not remove the lien of a mortgage, does not appear.

After a decision so authoritative as that of *Jackson v. Crafts*, and the lapse of nearly twenty years, there being in the intermediate time at least two distinct recognitions of the doctrine in the Supreme Court (5 Wend. 617; 11 *Id.* 538), this question might well have been regarded as at rest. It sprang, however, into a new existence under the opinion of the Chancellor; and although the Supreme Court, with a new bench of judges, reaffirmed its position after a most elaborate and searching examination, the subject was perhaps a suitable one for final adjudication in the tribunal of last resort. The action of ejectment was accordingly carried to the Court for the Correction of Errors, which affirmed the judgment of the Supreme Court. (*Farmers' Fire Insurance and Loan Company v. Edwards*, 26 Wend. 541.) The cause was most fully argued by some of the ablest gentlemen at the bar, and the decision of the court was pronounced beyond all possibility of cavil on the very point now in controversy. The Chancellor, who was a member of the court, and could and did take part in the decision, was for reversal on two grounds, which he stated: 1. That the written contract to sell the premises to the Merritts was a sale within the meaning of the saving clause in the charter of the company. After that contract was made, and a part of the purchase money paid, he thought the lands no longer remained in the hands of the company unsold, so as to authorize the mortgagor to redeem. 2. On the ground that a tender of the mortgage money after default in pay-

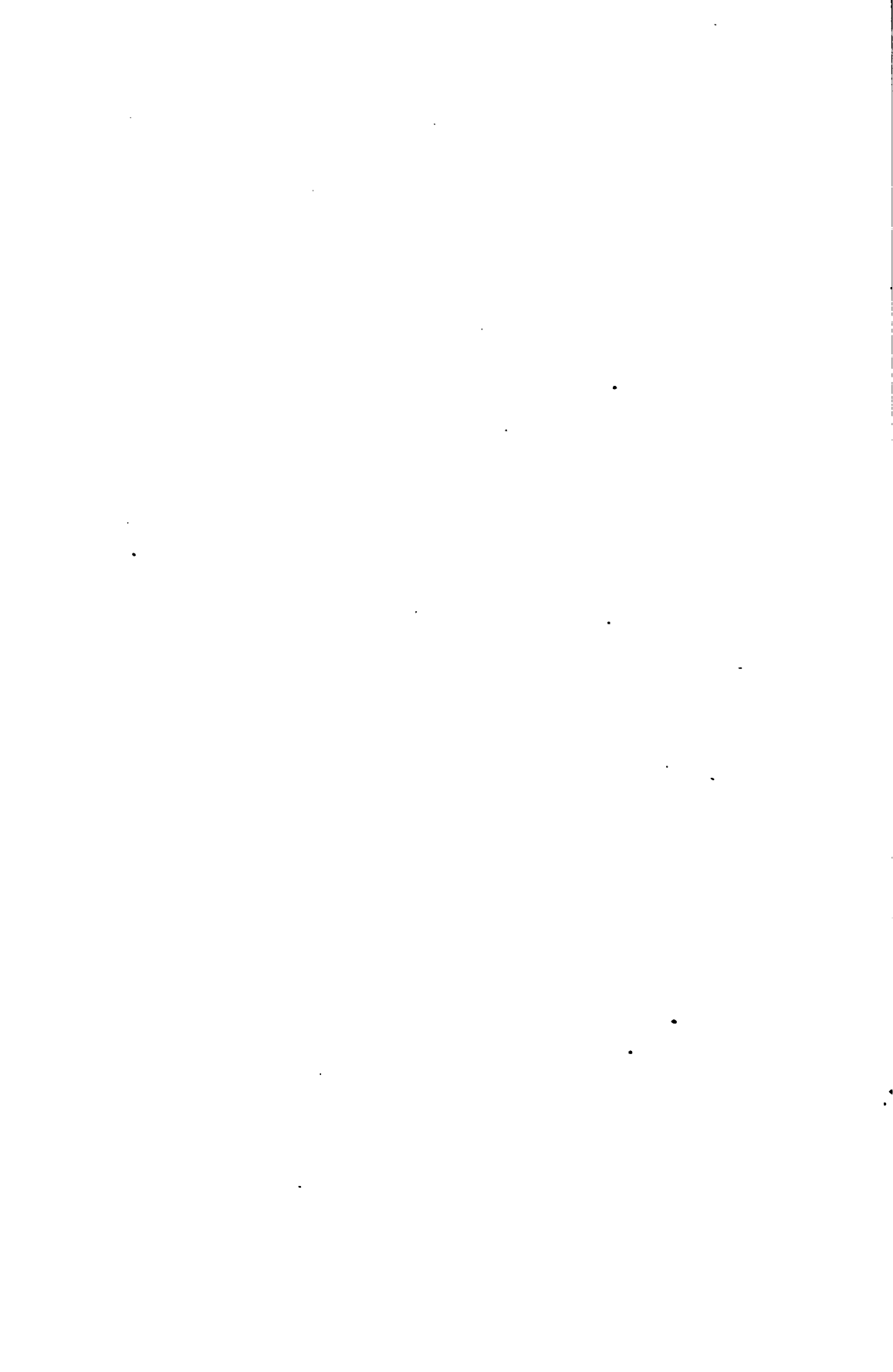
ment at the day could not in any case have the effect to extinguish the lien. With the Chancellor concurred seven of the Senators. Senator Verplanck delivered an opinion in favor of affirmance, discussing on the other side the same questions and no others. He made no attempt to sustain the decision on the ground that the law day of the mortgage was extended by the charter in any sense different from a mere continuation of the right to redeem or pay off the debt after the original default and after the foreclosure and sale. No member of the court, on either side of the general question, so much as mentioned that ground of decision; and most manifestly the right to redeem given by the charter, notwithstanding a foreclosure and purchase by the company, could not have, and was not designed to have, the effect of enlarging the contract in respect to the specified time of paying the debt. With Mr. Verplanck concurred the President of the Senate and a majority of the Senators. We are bound to say that the judgment was pronounced on the two propositions discussed in the respective opinions, and it necessarily affirmed both of those propositions. There is no other conceivable explanation to the judgment, unless we say that a judicial foreclosure and sale created a new law day of indefinite continuance, after the one appointed in the contract had long since passed; and this we cannot say, because such a position was in itself wholly untenable, and was not even alluded to by any member of the court. No one who will read the case with a little attention can fail to be satisfied that it was a decision most deliberately pronounced upon the very question now to be determined.¹ . . .

Such being, as I think, the clear result of the authorities, a renewed discussion of the question may seem to be unnecessary. I cannot help saying, however, that a decision by this court in opposition to the rule laid down in the cases referred to would introduce into the law of mortgage an inconsistency too plain to escape observation. In the early history of that law the courts of equity, departing from the letter of the contract, but adhering to the intention of the parties, adopted the just and liberal doctrine that a mortgage was but a pledge or security, always redeemable until foreclosure. The courts of law followed in the same direction. As Lord Redesdale observed (Mitf. 428): "The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law

¹ Here follows an examination of the case of *Arnot v. Post*, 6 Hill, 65, which is omitted.

Cases did not rest on any extension of the law day.

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of the next." Such, preëminently, has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity respecting the rights of mortgagor and mortgagee have been incorporated into the code of the common law, so that there is now no difference between the two systems. This has been true in substance for nearly a century past. In *Martin v. Mowlin*, 2 Burr. 978, decided by the English King's Bench in 1760, it was held that whatever words in a will would carry the money due upon a mortgage would carry the interest in the land. Lord Mansfield said: "A mortgage is a charge upon the land, and whatever would give the money would carry the estate in the land along with it. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to the executor; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it though the debt were forgiven only by parol." So, in *The King v. St. Michaels*, Doug. 632, it was said by the same judge that "a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security." To the same effect is *The King v. Edington*, 1 East. 288, and such is the uniform tenor of the English authorities. (See 6 Conn. 159.)

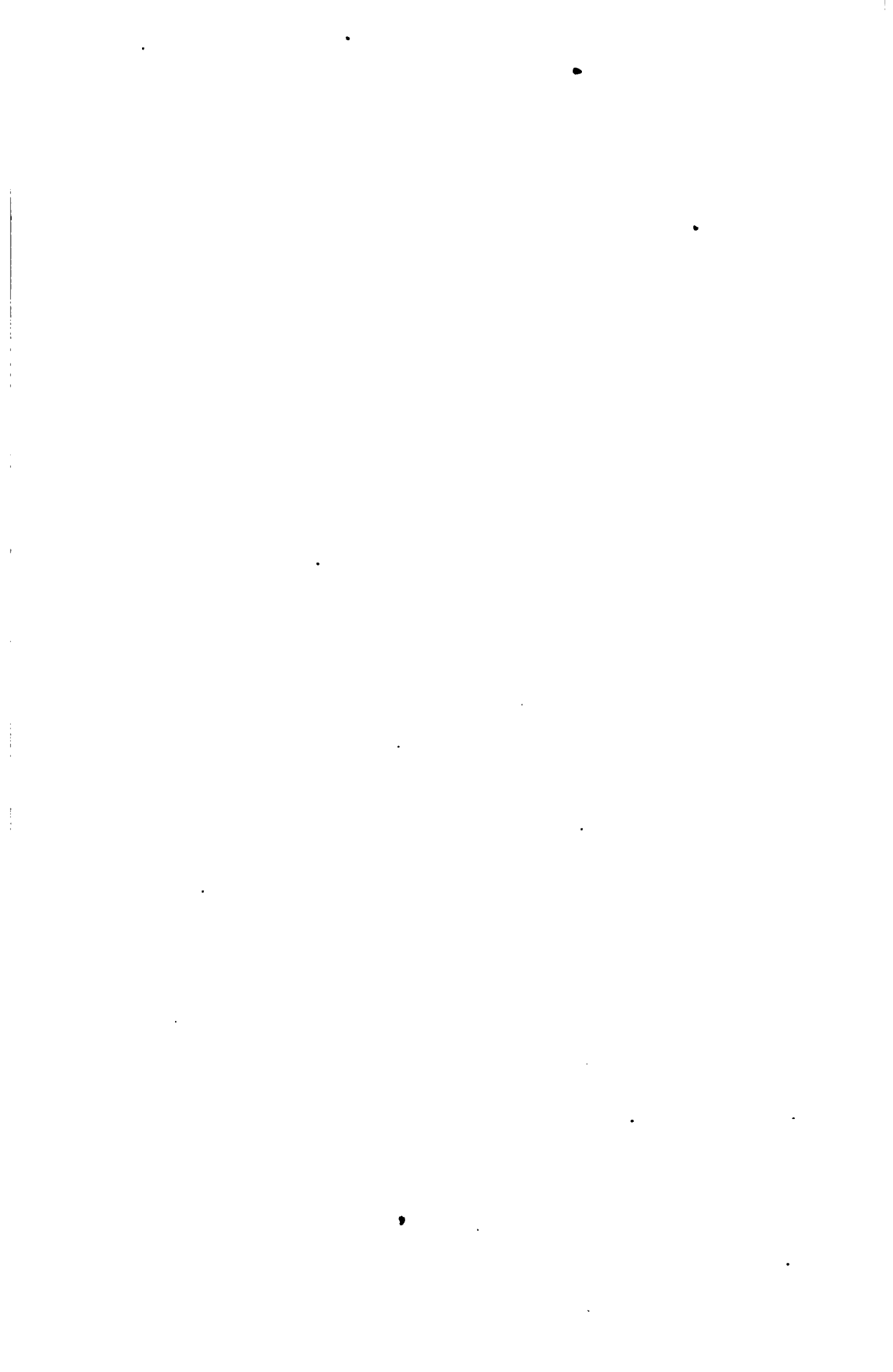
In this State, the rules of law and equity in regard to mortgages have never differed in any degree; it being the doctrine of both systems that a mortgage is but a personal interest merely. This proposition, in its full length and breadth, was determined in *Runyan v. Mersereau*, 11 Johns. 534, where the question arose in the most direct manner whether the freehold was in the mortgagor or mortgagee. The plaintiff, deriving title under the mortgagor, sued in trespass for cutting timber, the defendant justifying under a license from the mortgagee. It was held that the action was maintainable, the decision being placed explicitly on the ground that the former was the real owner of the land, while the latter had a chattel interest only. So it has been held in repeated decisions that the mortgagee cannot, in any way, convey, devise, mortgage or incumber the land, while the mortgagor can do all these things; that judgments against a mortgagee, which are a lien on all legal estates, do not affect his interest in the lands mortgaged; that such an interest does not descend to heirs, but goes to the personal representative as a chose in action; that it is not subject to dower or curtesy; that it passes by a parol transfer, and by any transfer of the debt; and, finally, that it is extinguished by payment, or by whatever extinguishes the debt. (3 Johns. Cas. 329; 1 J. R. 590; 4 *Id.* 42; 7 *Id.* ?

278; 15 *Id.* 319; 6 *Id.* 290; 2 *Paige*, 68, 586; *Wend.* 603; 2 *Barb.* Ch. 119.)

Wol. But it has been said that the mortgagee could maintain ejectment against the mortgagor until our Revised Statutes abolished that remedy in such a case, and that even since those statutes the mortgagee, being in possession, may retain it until the debt is paid. All this is true; but it presents no anomaly or inconsistency in the law. The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain the possession of the pledge for the purpose of paying the debt. (6 *Conn.* 163.) Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. Any contract for the possession of lands, however transient or limited, will carry the right to recover that possession; and such was deemed to be the nature and construction of a mortgage, it being considered that the parties intended the possession of the thing hypothecated should go with the contract. Ejectment was not, in fact, a real action at the common law. That remedy, in its origin, was only to recover possession according to some temporary right; and it was only by the use of fictions that the title was at length allowed to be brought into controversy. (3 *Bl.* 199, 200.) When the Legislature, by express enactment, denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagee, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge; but when its object is accomplished it is neither just nor lawful for an instant longer.

PL. and m. nec. of Eject.

There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. Thus the words "law day" once, and very expressively, marked the time when all legal rights were lost and gone, by the mortgagor's default. There is now no such time until foreclosure by a judicial sentence or sale under a power. But the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from



words rather than things. So we have the terms "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive and are in use, although the ideas they once represented have long since become obsolete. Even the word "forfeiture," still so often used, is no longer, in reference to this subject, the expression of any principle, as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale had in the manner prescribed by the statute law, if he has himself, in the contract, given authority thus to sell; but, until foreclosure, his estate the day after a default is exactly what it was the day before. Controversies like the present would cease to arise if the mere terms of the law were no longer confounded with its principles.

The proposition that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are, that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. (3 Johns. Cas. 243; 12 J. R. 274; 6 Wend. 22; 6 Cow. 728; *Coggs v. Bernard*, 2 Lord Ray. R. 916.) Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true has been sufficiently shown.

It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt and accept a tender on peril of

losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing, that any inconvenience can possibly arise. But, whatever may be the consequences of refusal, the creditor may justly charge them to his own folly.

The judgment of the Supreme Court must be reversed, and a new trial granted.

DAVIES, J. [after a careful examination of the earlier authorities, proceeded as follows]: The rule in England was therefore ancient and well settled, that payment on the law day extinguished the interest of the mortgagee in the lands mortgaged; and tender and refusal at the same time produced the same result. But payment after, and acceptance, did not revert the estate in the mortgagor without a reconveyance from the mortgagee; and a tender and refusal would, of course, not produce that result. The mortgagor's only remedy was to avail himself of the benefit of the rule in equity, and file his bill to redeem. The only question presented for our consideration in this case is, whether a tender of the sum due on a mortgage, after the day appointed by it for its payment, extinguishes the lien of the mortgage on the land covered by it. We have seen that by the common law such tender and refusal upon the law day extinguishes the lien of the mortgage, though the debt remains. In this State the law is well settled that a mortgage is a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it, and that the mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against even the mortgagee. (*Runyan v. Mersereau*, 11 John. 534.) The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by those principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. (*Kemble v. Wallis*, 10 Wend. 374.) This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without

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(releasing his prior debt. (*Coit v. Houston*, 3 John. Ca. 243.) In *Hunter v. Le Conte*, 6 Cow. 728, the Supreme Court held that a tender of rent takes away the right to distrain till a subsequent demand and refusal; but it does not take away the right to sue for the rent as for a debt. It only saves the interest and costs. And that a tender of rent makes a distress wrongful, though the tender be not made till after the rent day. It will readily be perceived that the principle of this case bears directly upon the question now under consideration; and it is not perceived, if it be sound, why a tender and refusal of the amount due on a mortgage does not extinguish its lien equally with a tender of rent and refusal, which, as we have seen, extinguishes the right of distress. But a still closer analogy to the present question is presented by the law of tender, as to the lien on goods pledged. Lord Ch. J. Holt, in his opinion in the celebrated case of *Coggs v. Bernard*, 2 Lord Ray. 909, speaking of the fourth class of bailments, says: "If the money for which the goods are pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined." So also Comyn: "By tender of the money, the property in the goods is determined, and the pledge ought to be returned. But if the pawnee refuse to restore the pledge upon tender, trover lies against him." (Comyn's Dig., tit. Mortg., A, and cases there cited.) Holding, as we do, therefore, in this State that the land mortgaged is but a security for the debt due to the mortgagee, in other words, a pledge to him to secure its payment, it is difficult to see why the principles enunciated and well settled in reference to the pledge of personal property do not apply, and why a tender and refusal at any time of the full amount of the debt due does not extinguish the lien of the mortgagee, or pledgee, in the one case as it clearly does in the other.

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But I think we are not left at liberty to settle this case on principle, but are to regard it as authoritatively disposed of by the courts of this State. A very careful examination of the decisions has brought my mind to the conviction, contrary to my first impression, that we should regard the question now presented as not open to further discussion. I shall recur to the cases in which this question has arisen; and I think an examination of them will lead to the same conclusions to which I have arrived.¹ . . .

It is not perceived how the mortgagee is to be embarrassed, or his security impaired, by the adoption of this rule, as seems to be supposed by the Chancellor in *Edwards v. Farmers' Loan Company*,

¹ The examination of the authorities is omitted.

26 Wend. 552. If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no risk in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto*, and the mortgage remains intact for the residue. A much greater hardship might be imposed, and serious injury be produced, by holding that the mortgagor cannot extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says, that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth.

The only remaining question to be considered is, whether the tender in this case was well made, it not being followed with the allegation of *tout temps prist*, and the money not having been brought into court. It will be seen, by reference to the authorities, that these are not required when the tender has only the effect of extinguishing the lien, and does not operate to discharge the debt or sum owing. In the latter case the averment of *tout temps prist* followed up by bringing the money into court, is essential to a good plea of tender. (*Hume v. Peploe*, 8 East, 168; *Giles v. Hartis*, 1 Lord Ray. 254.) But if a man make a bond for the payment of a loan of money, and afterwards make a defeasance for the payment of a lesser sum at a day, if the obligor tender the lesser sum at the day, and the obligee refuse it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation. And in this case, in pleading of the tender and refusal, the party shall not be driven to plead that he is yet ready to pay the same, or to render it in court. (Co. Lit., note to § 335.) The same principle was held by the Supreme Court of this State in *Hunter v. Le Conte*, 6 Cow. 728, and cases there cited.

No question in reference to the taxes arises in this cause, upon the facts found by the referee. The referee found in favor of the appellants upon the question relating to them; and to his finding in that respect the plaintiff took no exception. It is not, therefore, to be reviewed in this court.

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The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

SELDEN, CLERKE, WRIGHT, BACON, and DENIO, Js., concurred; the latter putting his concurrence on the ground that the question was so far determined by authority in this State, that it would now be indiscreet to reëxamine it in the light of reason and the analogies of the law.

WELLES, J. (Dissenting.) The only question involved in the case is, whether the tender made by the defendant Cady, under the circumstances, was effectual to extricate the premises in question from the lien created by the mortgage of Blunt to Miller. This tender was made after the day provided in the bond and mortgage for the payment of the money, which is called the law day. If the sum tendered was sufficient in amount, and was made to the proper person, the question is reduced to the single point whether the lien of a mortgage is, *ipso facto*, discharged by a tender of the amount due made after the law day; because, if it is, there is no necessity, in an answer setting it up, of the allegation of *tout temps prist*, or of any evidence to show that the tender has been kept good, neither of which is contained in the present case; but the defendant relies solely upon the fact of a tender and refusal as equivalent to payment, for the purpose of extinguishing the lien of the mortgage.

If a tender has the effect in any case to release the lien, it produces that effect the moment it is made, whether accepted or refused. If accepted, it is a payment; if refused, it is the folly of the holder of the mortgage, and the lien is gone and cannot be restored by his subsequent change of mind and offer to receive the money tendered. This must be so; otherwise, the tender would not discharge the lien. It is quite different from the case of an ordinary plea of tender at common law, for the purpose of stopping interest and preventing costs, in an action for money due on contract, in which the plea must contain the averment of *tout temps prist*, and where a replication of a subsequent demand, before suit, of the money tendered, and refusal by the defendant, would be a good answer to the plea.

In the case of a mortgage which is collateral to the debt, it is agreed that a tender may be made by the person owning the equity of redemption, which will extinguish the lien of the mortgage forever, without affecting the debt. The primary object of a foreclosure suit is to enforce the lien, and if that is met by a sufficient tender, the cause of action is gone and cannot be restored by a subsequent demand and refusal. It is important, therefore, to consider whether the tender in the present case, being made after the

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law day, if good in other respects, had the effect to discharge the lien of the mortgage.¹ . . .

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My own opinion is, after a careful examination of the cases, that the weight of authority is in favor of the rule as it existed at the common law. If that rule has not been abrogated or modified, all will admit that it is the plain duty of the courts to follow and enforce it. Clearly there is no *stare decisis* in our way. It is of importance that the rule be definitely settled, and its boundaries defined. Before we hold a rule different from what we find it settled by the common law, we should require evidence that the rule has been changed by competent authority, either expressly or by necessary implication.

This evidence, the advocates of the change of the rule claim, is found in the changed character of a mortgage upon land, in consequence of various legislative enactments. We are told that when the rule of the common law in question was adopted, a mortgage conveyed a conditional estate in the premises, which entitled the mortgagee to possession, and upon which he could maintain ejectment; and that a mortgage does not now pass any estate in the land, but is merely the creation of a specific lien as security for the payment of a debt or the performance of a duty; and that the statute has taken away the right of the mortgagee to maintain ejectment.

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All this is true; and doubtless other shades of difference may be found between the legal effect of a mortgage at common law and as it now exists. But they will be found to relate to the remedy, or to consist in collateral or incidental circumstances. Mortgages are substantially what they always were. The fact that they are not now regarded as transferring the freehold, but are merely specific liens, is altogether theoretical and ideal, so far as respects the question under consideration. The great object of these instruments is the same now as it always was—that of security for the payment of money or the performance of a duty. A mortgagee in possession is now, as always heretofore, accountable for rents and profits, and he may still defend his possession with the mortgage the same as ever. I know of no difference between the right of the mortgagor, or the person owning the equity of redemption, to redeem the premises from the lien of the mortgage, as that right now exists, and as it existed in the time of Coke or Littleton. That right is governed now by substantially the same rules as then.

The rule contended for by the plaintiff is reasonable, convenient and just. In the first place, the parties to the mortgage have, by agreement, fixed upon the time of payment, and if the mortgagor

¹ The learned judge then re-examines the New York authorities. This portion of the opinion is omitted.

fulfills his agreement by paying on the day appointed, or tendering payment on that day, the lien is discharged. The parties are then to be ready, the mortgagor to pay, and the mortgagee to receive. If the former performs his duty, or tenders performance, and the latter refuses, his lien is gone forever; he has no excuse for his folly, and is entitled to no consideration for the loss of his lien. On the law day each party is presumed to know exactly what his duty is, and the amount the mortgagor is bound to pay and the mortgagee entitled to receive.

If the mortgagor allows the law day to pass without payment or tender, he then is a defaulter. If he can discharge the lien by a tender of payment the next day, there is no reason why he may not do the same by a tender after the lapse of one year or of ten years. *Will?*

Suppose the mortgagee goes into possession under the mortgage, by consent of the mortgagor, immediately upon default of payment, and the latter takes no steps towards payment for years after; what amount shall he tender when he gets ready for payment? what abatement from the principal and interest shall be made for mesne profits? Shall the defaulting mortgagor be permitted to select his own time, and then make a tender of such an amount as he shall deem proper, and the mortgagee be bound to accept it in full, at the peril of losing his lien forever? *And any?*

Suppose again the case of a defaulting mortgagor, who claims to have made partial payments, or to be entitled to a set-off, about which he and the mortgagee in good faith differ: according to the rule claimed by the defendant, he must accept in full the amount tendered at the peril of losing his lien, provided, upon a litigation, it shall be adjudged that the tender was sufficient in amount. It seems to me that the old rule is the only just and wholesome one that can be recognized. It is quite as favorable to the mortgagor as he can in reason ask. If he makes a sufficient tender after the day and before an action is brought to foreclose the mortgage, let him keep the tender good, and, when he is sued, let him set it up as a defence, bring the money into court and offer payment as in other cases, and the court will in such a case decree the mortgage satisfied and discharged, and adjudge costs against the plaintiff. Or if for any reason the mortgagor, or the person whose duty or interest it may be to have the lien discharged, does not wish to wait the mortgagee's time for foreclosing, let him make his tender and keep it good, and then bring his action to redeem, alleging the tender and offering to pay; and if, upon the trial, it is found that his tender was sufficient and the plaintiff was ready to pay, the court would give him all the relief which equity and justice required. In all *2*

these cases the mortgagee would have the right to have the disputed questions adjudicated without losing his lien for the amount in equity and justice due to him.

The rule contended for by the defendant would, in many cases, operate as a bounty to negligent and defaulting debtors, and mortgagees would, under its workings, be induced to purchase their peace at an unjust sacrifice.

For the foregoing reasons, I am of the opinion that the rule of Littleton, as expounded by Coke, and as, all now admit, was the rule of the common law in relation to the effect of a tender after the law day, is still the law of this State; and as the tender in this case has not been kept good, and the defendant's answer contains no offer of payment, and the facts found by the court before whom the cause was tried do not show that the tender has in any sense been kept good, or that the defendant was ready to pay, &c., I think that he can have no benefit by reason of it; and that the judgment should be affirmed, with costs.

omit
 Ejectment. Plff. utized promise to Judgment reversed.¹
 debt. After default he made a full
 tender to debt. which was refused.
 He claims tender ended utize. Hold
 not this in N.J. utize SHIELDS v. LOZEAR.
 only creates lien. True
 lien ceases COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1869.
 if debt ceases but tender (34 N. J. L. 496.)
 does not end debt. No
 reason why In ejectment. Error to the Supreme Court.
 Shd End This was an action of ejectment tried before the Chief Justice at
 utize. Under the Warren Circuit (a trial by jury having been waived by the
 will stop parties), to recover the possession of a tract of land situate in said
 out. Henry county. The action was commenced on the 13th of June, 1869,
 Costs perhaps and the plaintiff's right of possession was alleged to have accrued
 wd be in- on the 1st day of April, 1869. The plaintiff in error (who was the
 consistent plaintiff below) produced and offered in evidence a deed of con-
 to hold that veyance of the premises, made to him by the defendant and wife,
 it ends utize bearing date on the 9th of April, 1867.
 but not bond

¹ Caruthers v. Humphrey, 12 Mich. 270 (1864), Potts v. Plaisted, 30 Mich. 149 (1874), Storey v. Krewson, 55 Ind. 397 (1876), accord. So where mortgagee evades tender: Ferguson v. Popp, 42 Mich. 115 (1879), McClellan v. Coffin, 93 Ind. 456 (1883). And see Breitenbach v. Turner, 18 Wis. 140 (1864), and Mankel v. Belscamper, 84 Wis. 218 (1893), semble, accord. But the authorities generally are contra: Currier v. Gale, 9 Allen (Mass.) 522 (1865); Perre v. Castro, 14 Cal. 519 (1860); Crain v. McGoon, 86 Ill. 431 (1877); Matthews v. Lindsay, 20 Fla. 962 (1884).

71.7.156

The defendant then offered in evidence a mortgage made and executed to him by the plaintiff on the same premises, bearing date April 1st, 1867, together with the bond mentioned in and secured by said mortgage, conditioned for the payment of the sum of \$4,000 on or before the 1st of April, 1868, with interest from date. The plaintiff then offered in evidence a lease for the same premises, made and executed by him to the defendant, bearing date on the 9th day of April, 1867, for a term ending on the 1st day of April, 1868, in and by which said lease the defendant covenanted to quit and surrender up the premises to the plaintiff at the expiration of the said term, and proved that the rent agreed on was the interest of the mortgage money, and taxes and water rates. It was also proved and found as a fact in the cause, that a legal tender of the money due upon the said bond and mortgage was made by the plaintiff to the defendant after the first day of April, 1868, and before the commencement of this action, which tender the defendant refused to accept.

The evidence being closed, the plaintiff, by his counsel, asked the court to find and to give judgment that the plaintiff was entitled to have possession of the said premises on the 1st of April, 1868, by virtue of the said lease, and that said lease required the said defendant to deliver possession of said premises to the said plaintiff, which finding and judgment the court refused to make and give, and thereupon the plaintiff prayed an exception to such refusal, and that his exception might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

The . . . plaintiff . . . asked the court to find, as a fact, that a legal tender of all the money due and owing on the said bond and mortgage was made by the plaintiff to the defendant after the 1st day of April, 1868, and before the commencement of this action, and, upon that fact, to give judgment for the plaintiff, on the ground that said tender extinguished and terminated any and all right the said defendant might have previously had to hold possession of the said land, by virtue of said mortgage. And the plaintiff, by his counsel, also asked the court, in case the plaintiff should be in error as to his asking in regard to the effect of the said lease, to permit an amendment of the declaration to be made, so as to state that the plaintiff's right to the possession accrued at the time when the said tender was made.

The court did find, as a fact, that a legal tender of all the money due upon the said bond and mortgage was made by the plaintiff to the defendant after the 1st day of April, 1868, and before the commencement of this action; but the court refused to adjudge that said tender extinguished and terminated the right of the said de-

fendant to hold possession of the said land, by virtue of said mortgage, and did adjudge that said tender having been made after the day named in the said bond for the payment thereof, did not extinguish or terminate the right of the said defendant to hold possession of the said land, and that the said defendant was and is entitled to hold possession of said land, by virtue of said mortgage, notwithstanding the making of said tender, to which refusal and judgment of the court the plaintiff, by his counsel, excepted, and he prayed that his exception might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. s.]

The opinion of the court was delivered by

DEPUÉ, J. The bills of exception sealed at the trial raise two questions: First. Whether the defendant, being the tenant of premises under the plaintiff, could, at the expiration of his lease, make title under his mortgage without first yielding and surrendering the possession to the plaintiff. And, second, whether a tender by the mortgagor of the money secured by a mortgage, which is not accepted by the mortgagee, made after the day of payment named in the condition, terminates the estate of the mortgagee in the mortgaged premises, and extinguishes the lien of the mortgage on the land.¹

The extinguishment of the lien of the mortgage by the unaccepted tender of the mortgage money after the day named in the condition, was contended for by the plaintiff's counsel with much earnestness.

A mortgage, at common law, is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an estate on condition, and in a court of law was treated as subject to be defeated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. If made on condition that the conveyance should be void on payment of a definite sum of money on a given day, and the condition was performed according to its terms, the estate reverted back to the mortgagor without any re-conveyance, by the simple operation of the condition. A tender at the time and place and in the manner prescribed in the instrument itself was equivalent to performance, and operated to determine the estate of the mortgagee, and revest it in the mortgagor. (Lit. § 335; Co. Lit. 207, a.; 4 Kent, 193; Coote on Mortgages, 6; *Merritt v. Lambert*, 7 Paige, 344.) But when the condition was discharged by failure to comply with its terms, the estate of the mortgagee became absolute in law, and the title of the mortgagor was completely divested and gone, and a re-

¹ The opinion on the first point is omitted.

conveyance was necessary to restore him to his original estate. (Lit. § 332; 2 Black. Com. 158; Coote on Mortgages, 9.) So inflexibly was this harsh rule of the law adhered to, that it was remarked by a learned writer that if the debtor had no greater mercy shown to him than a court of law will allow, the smallest want of punctuality in his payment would cause him forever to lose the estate he had pledged. (Williams on Real Prop. 333.) The rigor of this rule was somewhat abated by the statute of 7 George II., ch. 20 (1 Evans' Statutes 243, re-enacted in this State December 3d, 1794, Nix. Dig., 4th ed., 608), which permitted a mortgagor, when an action was brought on the bond or ejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, to bring such money into court where such action was pending, which moneys so paid or brought into court were declared to be a satisfaction and discharge of such mortgage; and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or re-convey the mortgaged premises unto the mortgagor, or to such other person as he should for that purpose nominate and appoint. In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction to enforce a redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a re-conveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to, by compelling a re-conveyance on equitable terms.

In the United States, the prevailing doctrine in courts of law as well as in courts of equity, is to consider the mortgage as merely ancillary to the debt, and to hold that the estate of the mortgage is annihilated by the extinguishment of the debt secured by it, after the day of payment named in the condition. (2 Greenl. Cruise, 91, note 1; 4 Kent, 193.) In fact, the latter conclusion will necessarily follow whenever the mortgage is regarded not as a common law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this State this is the generally received aspect in which a mortgage is regarded, as a mere security for the debt. (*Per* Chief Justice Green, in *Osborne v. Tunis*, 1 Dutcher, 651; *per* Justice Southard, in *Montgomery v. Bruere*, 1 South. 279, whose dissenting opinion in the Supreme Court was adopted in the Court of Errors

in reversing the judgment of the Supreme Court. 2 South. 865.) Consequently, payment after the day will convert the mortgagee into a trustee of the legal estate for the benefit of the mortgagor. In *Harrison v. Eldridge*, 2 Halst. 407, Chief Justice Kinsey, speaking of payment after the law-day, says: "When the debt is discharged according to law the mortgagee has the legal seisin in trust for the mortgagor, and the court will never permit the trustee or those claiming under him to set up this legal estate in him or them, to defeat the possession of the *cestui que trust*. This principle is settled in *Armstrong v. Peirce*, 3 Burr. 1898. The same doctrine being applicable to all trustees, the court would not permit a recovery upon a merely formal title, when the *cestui que trust* could have compelled a re-conveyance immediately, and thus have acquired the legal title." The seventh section of the act of June 7th, 1799 (Rev. Laws, 463; Nix. Dig., 4th ed., 611, sec 11) which authorizes satisfaction to be entered on the registry of the mortgage, in discharge of the mortgage, gives a legislative sanction to this effect of payment in the case of a mortgage which has been recorded.

But a tender, though it is equivalent to performance where the question is whether the party is in default, is not a satisfaction or extinguishment of a debt. Tender of the mortgage debt on the day named as performance of the condition, and by force of the terms of the condition, determines the estate of the mortgagee, and the condition being complied with, the land reverts to the mortgagor by the simple operation of the condition. The courts of the State of New York have given the same effect to a tender, without payment, after the day prescribed for payment. This doctrine was first asserted in *Jackson v. Crafts*, 18 J. R. 110, on a misapprehension of a passage from Littleton. (Lit. §§ 335, 338.) It was denied by the Chancellor in *Merritt v. Lambert*, 7 Paige, 344, and re-affirmed in the Supreme Court in *Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467; and in the Court of Errors, in the same case on error, 26 Wend. 541; and by the Supreme Court in *Arnot v. Post*, 6 Hill, 65; and again denied by the Court of Errors in reversing the last-mentioned case. (*Post v. Arnot*, 2 Denio, 344.) Finally, in *Kortright v. Cady*, 21 N. Y. 343, the question was set at rest in the courts of that State by re-affirming the rule laid down in *Jackson v. Crafts*, and it seems now to be the settled law in that State that a tender of the money due upon a mortgage at any time before foreclosure discharges the lien without payment, though made after the law-day. I do not find that the rule, as finally established in the courts of New York, has been adopted by the courts of any other State. In Massachusetts

the decisions have been to the contrary. (*Maynard v. Hunt*, 5 Pick. 240; *Currier v. Gale*, 9 Allen, 522.) In an early case in New Hampshire (*Swett v. Horn*, 1 New Hamp. 332), the court held, under a statute declaring that all real estate pledged by mortgage might be redeemed by paying all costs, &c., provided such payment or performance or tender thereof be made within one year after the entry of the mortgagee for condition broken, that tender more than a year after breach of condition, where no entry had been made by the mortgagee, discharged the lands. In a subsequent case the same court qualified the ruling of this case by denying this effect of the tender unless the money was brought into court. (*Bailey v. Metcalf*, 6 New Hamp. 156.) It may with safety be said that the doctrine of the New York courts, originating in error, and maintained against the opinion of some of the most eminent jurists that have occupied the bench of that State, is without the support of any judicial tribunal in this country, and it is impossible to perceive upon what principle of law or equity it can be rested. As already observed, tender on the day named determines the estate of the mortgagee, because it is performance of the condition. Regarding the mortgage as remaining after default only as a security for the debt, payment thereafter, by a necessary sequence, operates as extinguishment; the debt being the principal and the security the accessory. Whatever discharges the debt extinguishes the security. No reason, founded in principle, can be assigned for giving that effect to a tender after forfeiture. The appropriate office of a tender is to relieve the debtor from subsequently accruing interest, and the costs of enforcing, by a suit, the obligation which by the tender of payment he was willing to perform. The debt still remains. In the case of a common money-bond, before the statute 4 Anne, ch. 16, § 12, re-enacted in this State (Nix. Dig. 631, § 9), payment after the day would not be pleaded without an acquittance by deed. (2 Saund. 48, c, note 1; *Rosencrantz v. Durling*, 5 Dutcher, 191.) The statute only applies to payments actually made, and a tender after the day cannot be pleaded. (2 Saund. 48, b, note i.) And if the tender is made on the day, it can only be made available by plea, accompanied by payment into court. (Co. Lit. 207, a.)

Where, as in this case, the mortgage is accompanied by a bond, to hold that a tender, after default, extinguished the mortgage, for the reason that after such default it remains only a security for the debt, will lead to the incongruity of giving to the tender an effect with respect to the security, which by the rules of pleading and established principles of law the court must deny in an action on the bond, which is the immediate evidence of the debt. If the

form of the instrument which evidences the debt is overlooked, and the question is viewed in the aspect in which the indebtedness immediately arose, the tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest and to free the debtor from costs, it will be deprived of that efficacy by a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the question of subsequently accruing interest and costs to be varied by the subsequent demand and refusal.

The instances in which a tender and refusal amount to payment, and will operate as an extinguishment, are those in which the obligation is in the nature of a gratuity, without any precedent debt or duty, and the discharge is an accidental and not a necessary consequence of the tender and refusal, there being no debt or duty remaining whereon to ground an action. (6 Bac. Abr. 456, title 'Tender, &c., F.) If there is a precedent debt, as a loan of money, which the debtor secures by a mortgage on his land, conditioned for payment, though by a tender made on the day the land is freed and the feoffer may enter according to the condition, the debt is not thereby discharged, and may be recovered by action of debt. (Co. Lit. 209, a.) The effect of a tender on the day in terminating the estate of the mortgagee cannot be denied, because it is a legal incident of his estate. Another legal incident of that estate is the extinguishment and discharge of the condition by a failure to comply with its terms. Upon this courts of equity raised an equitable estate in the mortgagor, called an equity of redemption, which consisted in his right to have the estate of the mortgagee continued as a security for the debt, notwithstanding the default. In equity, a tender will stop the accruing of interest, and will, in some cases, cast upon the mortgagee the costs of a suit for redemption. But until the mortgagee is actually paid off by his own consent, or by the decree of the court, he retains the character of the mortgagee, with all the rights incident to it. (*Grugeon v. Gerrard*, 4 Younge & Coll., Exch., 119-128.)

When a court of law undertakes to deal with this equitable estate it must do so upon principles of equity, and keep in view the relief which would be afforded in equity, and protect the rights of the parties accordingly. The recognition of this equitable estate has been obtained in courts of law by the fiction of regarding the mortgagee, after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seisin of the mortgagee is not a mere formal title, and no trust will be

raised for the benefit of the mortgagor until the purpose for which the mortgage was made is answered.

It was stated on the argument that the money due on the mortgage was brought into court at the trial. That fact does not appear in the bills of exceptions. It is not necessary, therefore, to decide whether a court of law could enforce redemption in cases within the equity, though not within the strict letter of the statute. The English courts of law have given a strict construction to the corresponding statute of 7 George II., ch. 20, and have held the circumstances of the litigation mentioned in the preamble and in the statute to be jurisdictional facts, which the court is not at liberty to disregard. (*Doe v. Clifton*, 4 Ad. & El. 809; *Good-title v. No-title*, 11 Moore, 491; *Sutton v. Rawlings*, 3 Exch. 407.) The statute should be strictly construed, and is not applicable to any case in which the mortgagor is himself the actor. It was designed to apply only in certain cases mentioned in its preamble and in the introductory words of the statute, and was not intended to supplant bills for redemption. The subject is one that falls peculiarly within the jurisdiction of courts of equity. The remedy there is complete by bill for a redemption, and relief may be speedily obtained by the exercise of the undoubted power of the court, by the writ of assistance to carry into effect its decree, by putting the mortgagor in possession, where the mortgagee has obtained possession under the mortgage. (*Yates v. Humbly*, 2 Atk. 363; *Green v. Green*, 2 Simons, 399, 406; Bacon's Ordinances in Chancery, 9; *Valentine v. Teller*, Hopk. C. R. 422; *Devancene v. Devancene*, 1 Edw. C. R. 272; *Kershaw v. Thompson*, 4 Johns. C. R. 609; *Schenck v. Conover*, 2 Beas. 221; *Fackler v. Worth*, *Ib.*, 395; *Thomas v. De Baum*, 1 McCarter, 37; 2 Dan. Chan. Prac. 1280.)

It is not, therefore, essential to the administration of justice that courts of law should, in the absence of the imperative requirements of a statute, entertain a jurisdiction that pertains to courts of equity, in the exercise of which equities may arise that a court of law may be incompetent to deal with.

There is no error in the rulings of the court below, and the judgment should be affirmed.

*Tender must be to person
autho'ized & must be
of full amt. due & con-
ditional. Re-
sides tho' tender dis-
charge, intge it does
not en-
title intn
to come in.
Eg. to up-
get intge
decided
void.*

TUTHILL v. MORRIS.
COURT OF APPEALS OF NEW YORK, 1880.
(81 N. Y. 94.)

Appeal from judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to restrain the defendant from selling certain premises in statutory proceedings to foreclose two mortgages thereon and to have the same adjudged to be extinguished and to require defendant to cancel the same of record, on the ground that the amount of the mortgages was duly tendered and refused.

The mortgages were executed by plaintiff. The mortgagees commenced proceedings to foreclose the same by advertisement under the statute. Pending the proceedings they assigned the mortgages to defendant. Defendant requested one Steers, an attorney, to attend the sale for him. The circumstances and the nature of the employment, together with the occurrences out of which the alleged cause of action accrued, are set forth in the opinion.

*Clause in
intge giv-
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sell on
advertis-
ment.*

RAPALLO, J. The uncontroverted evidence shows that Mr. Steers, to whom the tender relied upon by the plaintiff was made, was not the attorney in the foreclosure proceedings nor connected with such attorney, nor the agent of Mr. Morris, except for the specific purpose for which he was employed; that his first and only connection with Mr. Morris or the foreclosure was that he was requested, on behalf of Mr. Morris, to go to the place of sale and engage an auctioneer, and to attend the sale and see that it was properly conducted. It may also be inferred from the testimony that he was instructed that the sale should be for cash. It is conceded by the respondent's points that Mr. Steers had no express authority to receive a tender and that none was thought of. Mr. Steers did not know nor was he informed of the amount due for principal, interest, or costs, beyond such information as was afforded by the notice of sale, nor does it appear that he had any means of ascertaining the amount of the costs. He was not empowered to receive the purchase money, for this would be payable only on the execution of the deed by the mortgagee. When he arrived at the place appointed for the sale he was presented with a summons, complaint and order of injunction in an action by the plain-

(1) Tender must be to owner of mortgage debt or his agent. Clear.

So tender must be by person interested in Equity (i.e. having right to redeem) or his agent. Paramount title apparently need not i.e. can't redeem.

(2) Must give time to investigate. Up ante.

(3) Tender must be of full amt. Clear.
No evidence here that was.

(4) Anyhow tenderer can't get Eq. relief w.o. doing Eq. by paying all due.
But must he not only pay now but also have kept tender good? In our case apparently neither tender kept good nor offer to pay now. So clearly O.K. No
My. case requiring dec. that tender must be kept good. Hold can't get rid of apparent encumbrance w.o. paying.
Cases elsewhere go on that rule & say nothing as to keeping good. That seems right. But of course to stop int & costs must keep it good.

tiff against Mr. Morris, but declined to receive or admit service thereof on behalf of Mr. Morris, on the ground that he was not his attorney. The injunction order was then read to him. It ordered that the sale be upon the terms, among others, that not more than 10 per cent. of the amount bid be paid down. He stated, as testified to by the plaintiff's attorney, that he was instructed to sell for cash, and said that if he could not do that he should adjourn the sale, and accordingly instructed the auctioneer to adjourn the sale for thirty days. After he had announced his intention to adjourn the sale, but before he had instructed the auctioneer, and as he was about doing so, the alleged tender was made by Mr. Tuthill, one of the plaintiff's attorneys, in the following manner, as testified to by Mr. Tuthill: Mr. Tuthill testifies that he tendered to Mr. Steers a quantity of greenbacks, amounting, in fact, to \$6,300, and said to Mr. Steers that he tendered the money in behalf of the plaintiff for the whole amount due. That he did not state how much money there was, but tendered it, and said to Mr. Steers: "I want to pay the whole amount if you will let me know how much it is," and Steers replied that he did not know. Witness then said: "Will you take this money?" and he said he would not, and asked what witness wanted to pay for, and witness said that he wanted to pay for the notes, interest and costs. Immediately after this conversation, the auctioneer, under the instruction of Mr. Steers, announced the adjournment of the sale for thirty days.

Mr. Steers testified that in declining to receive the money he stated that he was not authorized and that the sale was adjourned.

We perceive nothing in the course pursued by Mr. Steers indicating any purpose to oppress or take any undue advantage of the plaintiff. By the adjournment of the sale the plaintiff was relieved of all immediate pressure, and ample time was afforded, if he in good faith desired to pay off the mortgages, to seek the proper party and have the amount of interest and costs ascertained. It is apparent that the tender made was a complete surprise, and that even if Mr. Steers had authority to receive payment of the mortgages he was not in a situation to do so at that time or place. It is by no means clear that a person, not the attorney in the proceeding, but merely casually employed to superintend a mortgage sale and see that it is properly conducted, is by such employment authorized to receive the principal of the mortgage; but, irrespective of that point, when he announces that he is ignorant of the amount due for principal, interest and costs, and it is evident that he has not the means of information at hand as to the exact amount, it would be in the highest degree unreasonable to

must give time.

Wain for agency.

Must give time.

hold that a person thus situated is bound to take the responsibility of accepting or refusing a tender, and that his refusal discharges the lien of the mortgage. Insisting upon the immediate acceptance of a tender under such circumstances, and when the sale is about to be adjourned, indicates rather a design on the part of the mortgagor to take an unfair advantage of the mortgagee than to relieve himself from oppression.

*No evd. that
tender suff.*

Furthermore, there is no evidence in the case showing that the sum tendered was the full amount of principal, interest and costs. The sum tendered is said to have been \$6,300. The amount of principal and interest, according to the notice of sale, was \$6,150 and upwards. What was the amount of the costs in no manner appears in the case. To this point it is answered that Mr. Steers did not object that the amount tendered was insufficient, and that the plaintiff was ready to pay whatever amount was due. But Mr. Steers did state that he was ignorant of the amount, and he did not occupy such a relation to the case that it could be presumed that he knew or that it was his duty to know the precise amount.

Neither does it appear that any specific amount was tendered. The plaintiff's witness, Mr. Tuthill, exhibited a quantity of bills, but he admits that he did not name the amount, though he asked Mr. Steers to count them, and, taking the whole evidence, it is not clear that Mr. Tuthill offered to pay the whole amount he had in his hand, if it exceeded the amount due. When asked what he wanted to pay, he replied, "the notes, interest and costs." He had previously said that he wanted to pay the whole amount if Mr. Steers would let him know how much it was, and Steers had told him he did not know. The fair construction of this testimony is that he desired to pay the amount due only, and before paying desired to be informed of the amount, but that the person to whom he applied had not the means of giving the information.

We are of opinion that the plaintiff failed to make out a tender to the defendant and a refusal which discharged the lien of the mortgage. In view of the serious consequences resulting from the refusal of such a tender, the proof should be very clear that it was fairly made and deliberately and intentionally refused by the mortgagee, or some one duly authorized by him, and that sufficient opportunity was afforded to ascertain the amount due. At all events, it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due. The burden of that proof is on the party alleging the tender.

*time to invest
gets near.*

But even if a sufficient tender had been made out, this action could not, in our judgment, be maintained. Although the authorities cited sustain the proposition that when a tender has been

*they lose as
it is off.
relief.*

duly made of the full amount due it will discharge the lien and be a good defense against its enforcement, without the tender being kept good, yet we are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks in this action and which the judgment awards him, viz., the extinguishment of the mortgage. A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt it must rest on strict legal rather than on equitable principles. The circumstance that a security has become or is invalid in law, and could not be enforced even in equity, does not entitle a party to come into a court of equity and have it decreed to be surrendered or extinguished without paying the amount equitably owing thereon. Even securities void for usury would not be cancelled by a court of equity, without payment of the debt with legal interest, until, by statute, it was otherwise provided. This statute does not change the general principle of equity, but on the contrary recognizes it, by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage.

We are of opinion, however, as already stated, that no sufficient tender was shown, and that on both grounds the judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.¹

See card.

¹ *Weyer v. Tuck*, 127 N. Y. 217 (1891), *Nelson v. Loder*, 132 N. Y. 288—*Seemingly only* (1892), *Cowles v. Marble*, 37 Mich. 158 (1877)—*accord.* But see *Moynahan v. Moore*, 9 Mich. 9 (1860) and *McClellan v. Coffin*, 93 Ind. 456 (1883), *contra.*

9 Mich. 9. Apparently *replevin* for chattel & so o.k.
 13 Ind. 456. Not *contra.* Utter to secure doing of certain work. Utter refused to furnish work & so discharged oblig of mtgor entirely. Held then lien of mtgor gone & k'd be cancelled. For mtgor sh'd return some land taken as last pay for work. Court rather side step that.

Order
 740
 753 → 769
 758
 763 → 750
 741
 746
 742
~~750~~

CHAPTER V. (continued.)

SECTION II. OTHER DISCHARGE OF DEBT.

SPEARS v. HARTLY.

COURT OF COMMON PLEAS, 1800.

(3 *Espinasse*, 81.)

*That debt is dis-
 charged by St. L.
 does not prevent
 the acquisition of
 a lien for the
 debt.*

This was an action of trover, for a log of mahogany.

The defendant was a wharfinger, and claimed a lien on it, as well for the wharfage as for the balance of a general account, which balance was due in the year 1790; under which lien he justified a right to retain it.

Best, Serjeant, for the defendant, contended that, admitting the defendant might claim a lien for the wharfage due on a particular article, he was not entitled to such lien for the balance of a general account.

LORD ELDON, referring to the case of *Naylor v. Mangles*, ante, 1 vol. 109, said: This point has been ruled by Lord Kenyon, that a wharfinger has a lien for the balance of a general account, and considered as a point completely at rest; I shall, therefore, hold it as the settled law on the subject that he has such a lien as is claimed in the present case.

Best then contended that it appeared that the balance which the defendant claimed to be due, and under which he entitled himself to a lien, had accrued in the year 1790, and so was barred by the statute of limitations; the debt being therefore discharged by operation of law, the defendant could not be entitled to any lien by virtue of it.

LORD ELDON: If what has been stated by the defendant's counsel be law, that the debt is discharged by the operation of the statute of limitations, no lien could be obtained by reason of it: but the debt was not discharged; it was the remedy only. I am of opinion that though the statute of limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case the defendant had a subsisting demand

- (1) Seems perfectly O.K. Could find no other case.
- (2) That debt is barred, a fortiori, does not bar enforcing lien.

(1) Only case Jones cited, § 939.

(2) Case clearly O.K. Arrest of body only suspends other remedies at most. 16 A.R.E. Eney. 49. If the cred. voluntarily releases him that is an absolute discharge of debt. 16 A.R.E. Eney. 53. But that was not case here. So when debtor got out all rights on mtge. ruined.

(3) Release of debt releases mtge. ^{and}

(4) Failure to give indorser notice does not release mtge given by him to so-
Cure plf. ^{cred.}

when the goods came to his possession; and I am of opinion he may enforce it by the lien which the law has given him for his general balance.

Verdict for the defendant.

Taking body of debtor in execution does not release mortgage to secure debt.

DAVIS v. BATTINE.

HIGH COURT OF CHANCERY, 1830.

(2 Russ. & Myl. 76.)

A creditor who had a mortgage security for his debt had sued the debtor, and taken him in execution. The debtor afterwards took the benefit of the Insolvent Act.

On an exception to the Master's report, the question was raised whether the debt was not satisfied by the body of the debtor having been taken in execution, so as to extinguish the lien of the creditor on the land.

Mr. Treslove and Mr. Martin, in support of the exception.—In *Barnaby's Case*, 1 Strange, 653, it was held that a creditor who had taken the body of his debtor in execution could not be a petitioning creditor to sustain a commission of bankrupt, because the body of the debtor being in execution was, in point of law, a satisfaction of the debt. If the debt be absolutely satisfied, how can the creditor claim further satisfaction? No instance can be adduced in which a mortgagee having taken the body of the mortgagor in execution for the mortgage debt, has gone on to foreclose. The principle of the court is, that a mortgagee, though he may have recourse to all his remedies, cannot have a double satisfaction. If he forecloses and sells the estate, he will not be permitted afterwards to sue on the covenant for the deficiency. (*Perry v. Barker*, 13 Ves. 198; *Tooke v. Hartley*, 2 Bro. C. C. 125.)

Mr. Wilbraham, *contra*.

The Master of the Rolls [SIR JOHN LEACH] said he did not remember to have heard it ever suggested that a mortgagee, by proceeding to execution against the body of the debtor, released his interest in the land; and he overruled the exception.

BRINCKERHOFF v. LANSING.

Court of Chancery of New York, 1819. *quind pay me of 1500\$ in 6 m or save intge*
(4 Johns. Ch. 65.)

Bill filed February 4th, 1812, by John Brinckerhoff, Nathan Morey, and Aaron Wilcox against Levinus Lansing, Otis Bates, and James Adams to restrain defendants from selling certain premises in Lansingburgh under a *fi. fa.* levied thereon by defendant Lansing, or under a power of sale contained in a mortgage, executed September 2, 1802, by defendant Bates to said Lansing, to secure the latter against loss on a note endorsed by him for Bates. The plaintiffs claim title to the property in question, and allege that on April 3d, 1806, a judgment by confession was entered up against defendant Bates in favor of defendant Lansing to indemnify him as such endorser, and that the note or notes, to secure which the mortgage was given, were afterwards discharged. The other material facts are given in the opinion.¹

THE CHANCELLOR [KENT]: The claims of the three plaintiffs are entirely separate from each other, and rest on distinct grounds.

1. The plaintiff Wilcox claims as a purchaser under the defendant Bates, and seeks to be relieved from the operation of a judgment of 1806, against Bates, in favor of the defendant Lansing. The counsel for the defendant Lansing admitted at the hearing that the judgment complained of was satisfied; consequently, the plaintiff Wilcox is entitled to the relief sought by the bill, and to have the defendant Lansing perpetually enjoined from any proceeding upon that judgment. The plaintiff Brinckerhoff also seeks the same relief, and is entitled to the same remedy in respect to that judgment.

2. The plaintiff Morey claims title to a lot in Lansingburgh, under a purchase upon execution against John Morey, who held under a lease of the defendant Bates, given in 1804, and he seeks to be relieved against the operation of a mortgage covering the same lot, and given by Bates to the defendant Lansing in 1802.²

3. This case, then, turns wholly upon the question whether the mortgage of 1802, from Bates to Lansing was, at the time of filing

¹This short statement of facts is condensed from the pleadings set forth in the report.

²The opinion relating to the claim of this plaintiff, viz.: that defendant Lansing is estopped by his dealings with this plaintiff from setting up the mortgage as to him, is omitted. The learned Chancellor reaches the conclusion that there is no estoppel.

*Not given to Se-
Cels a bond the
Cend. of wh. is-
quind pay me
of 1500\$ in 6 m
or save intge
harmless
a pay in
a note
a bank
for 1500
when call
for. Has
was re-
newed.
from time
to time
d some
time is
served to
sometimes
incorrupt
but now
to Mr. B.
Held the
Judge Co.
would re-
newals.
Said was
in tenor
It was
discharged
by intge
bond to
so sub.
Seymour
in cum
hance
Cd not
be injud*

1802
Bates
debt
debt to
part.
debt to
part.
Bainbridge
plg
money
plg
utge to indemnify
vs liability on note
in wh he was an
accom. party.
Lausung
debt

Pretty clearly Lausung's utge was vs.
Corded (744 ←) so plg are not B.F.P's.

- (1) Seems as matter of construction case
Clearly O.K.
- (2) Same thing has been held as to
utge to secure ^{limited} future advances. If
some advances paid & new ones utge
secures them if balance is not be-
yond limit.

the bill, to be deemed a valid subsisting mortgage for any part of the debt originally secured by it. In this question the plaintiffs Brinckerhoff and Morey are equally interested, for they both hold, by purchase under Bates, parts of the land covered by Lansing's mortgage.

It does not appear to me that the claim under this mortgage ought to be affected by other transactions totally distinct from it; any fraudulent pretensions of Lansing, under either of his judgments, are not to destroy his rights under the mortgage; it must stand and be investigated upon its own merits.

There is no doubt of its having been a fair, valid mortgage in the beginning, and given to indemnify Lansing, as endorser of a note drawn by Bates for 1,500 dollars. The only proper inquiry now is, Has Lansing been injured, and is he entitled to any indemnity for the injury he received by means of that note?

The proviso in the mortgage was, that Bates was to pay to Lansing 1,500 dollars with interest, "according to the condition of a certain bond, or writing obligatory, bearing even date therewith, executed by Bates to Lansing as a collateral security." The bond here referred to was, according to the condition of it, "to pay 1,500 dollars, with lawful interest, on or before the 7th of March, 1803, or keep the defendant L. harmless, and pay up the note endorsed by the defendant L. for the defendant B., in the Farmers' Bank, when the same should be called for."

The note referred to, in the condition of the bond, was of the same date with the bond and mortgage, and was for 1,500 dollars, payable in fifty-six days, and discounted at the Farmers' Bank, in favor of Bates. It appears by the testimony of L. I. Tillman that the note was renewed at the end of the fifty-six days by a new note made and endorsed in like manner, and so it continued to be renewed *toties quoties*, for a number of years. The calls were all paid, from time to time, by Bates, and the sum was reduced gradually, at times, to 900 dollars, to 700 dollars, to 600 dollars, and at one time to 400 dollars, and then it was raised again, on the renewal, to 1,000 dollars, and at one time to 1,300. The debt of 1802 was kept alive in the bank by these constant renewals and alternate variations in the sum until the 8th of October, 1811, when the sum was reduced to 720 dollars, and the note then alive, and for that sum, was protested for non-payment. This catastrophe put a stop, according to the usual mercantile phrase, to the running of the note in the bank, and the defendant Lansing, as endorser, was obliged to take up and pay the note, which he did by a note of his own, as drawer, endorsed by the defendant Adams.

Adams.

I see no good reason why the bond and mortgage should not |||

stand as an indemnity and security for the 720 dollars, which Lansing was thus obliged to pay.

Altogether secured debt in it, saying state by these courts.
Ynd
Ynd
 The bond was intended as an indemnity against the bank debt, originally created by the loan upon the note for 1,500 dollars, so long as that bank debt should continue, under the customary renewals and fluctuations in the amount. The 1,500 dollars were, by the bond, made payable in six months; this fact shows that the parties contemplated a continuation of the debt beyond the fifty-six days, for which the original note was made payable. It was evidence of an expectation that the note was to be repeatedly renewed. The other part of the condition of the bond, that the defendant Bates was to pay the note in the bank "when the same should be called for," shows, also, the like expectation. Instead of fixing at the precise period when the first note was made payable, as would have been done in any other case, the parties adopt the loose commercial phrase applicable to a note running in the bank, and evidently allude to the calls for partial, and for final payment, to be made on the part of the bank. There is no doubt that this

As to putting him B.F.P.s or like
 construction of the instrument is according to its true meaning; and the mortgage continued a subsisting and valid security so long as the debt created in September, 1802, was kept alive in the bank, either in whole or in part, by these customary renewals. The mortgage, with its accompanying bond, fairly disclosed the nature of this continuing security, and no imposition was, or could have been, practised upon any subsequent purchaser or mortgagee who would be at the pains to examine into the state of the debt disclosed by the bond and mortgage. The mortgage itself disclosed the nature of the debt secured by the bond, when it stated that the bond was taken as a collateral security. Such a security for such a debt might subsist indefinitely; but what concern has the purchaser, or subsequent encumbrancer, with the nature of the security, provided there be no false lights held out, and he be, by the registry, timely and duly informed of the character of the lien?

*Was debt pd?
no.*
 The only objection of any force to the validity of the mortgage as a security for these renewed notes is, that the notes were occasionally increased, which might seem to be so far the creation of a new debt. But I apprehend such an occasional increase of the debt, on the periodical renewal, provided the debt was kept within its original limits, did not change the character of the debt or affect the security. It is not so understood in the commercial world, and was not so intended by the parties to the mortgage; and an increase of the sum on a renewal was no more than a return of some of the calls made on the former renewals. The identity of the debt remained, so as to preserve the relation between that and the pledge.

It would be dangerous and unjust, as between the parties, not to allow the whole note so renewed to come under the protection of the mortgage. There was nothing here like the novation of the civil law. There was no new debt created differing in quality or character, or relation or security. It was according to mercantile and bank usage (in reference to which the bond and mortgage were given) a renewal or continuation of the same debt, under the same circumstances, and subject only to those fluctuations in amount which are customary in such bank operations.¹

I shall, therefore, decree: 1. A perpetual injunction in favor of the plaintiffs B. and W. against any execution or other proceeding, on the judgment confessed by Bates to Lansing, and docketed on the 3d of April, 1806, and that entry of satisfaction of record of that judgment be made by the defendant Lansing.

*Consented by Pl.
of opinion.*

2. That unless the plaintiffs B. and M., or one of them, bring into court and deposit with the register, for the use of the defendant L., within thirty days, the sum of 720 dollars, together with lawful interest thereon from the 8th day of October, 1811, unto the day of bringing in the same, the injunction heretofore issued, in respect to any proceeding under the bond and mortgage in the pleadings mentioned, be thereafter dissolved, so far as to allow the defendant L. to demand and collect under it, or by virtue of it, the sum of 720 dollars, with interest from the 8th day of October, 1811, until the money shall be paid and the costs and charges of all necessary proceedings thereon.

Decree

3. That the bill, as to the defendant B., be dismissed, and that unless the plaintiffs B. and M. shall within thirty days elect to proceed against the defendant A., to enforce his proportion (if any) of contribution to the said debt and interest so declared due to the defendant L., and give notice of such election to the solicitor for the defendant Adams, that then the bill as to him shall stand dismissed.²

Consented by Pl.

Decree accordingly.

¹The rest of the opinion, relating to other aspects of the controversy between the parties, is omitted.

²*Choteau v. Thompson*, 3 Oh. St. 424 (1854); *McGuire v. Van Pelt*, 55 Ala. 344 (1876), accord. But see *Jarnagan v. Gaines*, 84 Ill. 203 (1876).

3 of C. was change of security, no variation in amt.
55 also. " " " "
84 Ill. " " " "

BUTLER v. MILLER.

COURT OF APPEALS OF NEW YORK, 1848.

(1 N. Y. 496.)

This was an action of trover brought in the Supreme Court by Butler and Vosburgh against Miller for a number of horses, cattle and hogs, and a quantity of farming utensils, and other property. The cause was first tried before Cushman, late Circuit Judge, at the Columbia Circuit, in September, 1843, when a verdict was had for the plaintiffs, which was set aside by the Supreme Court and a new trial ordered. (See 1 Denio, 407.) A second trial was had before Parker, Circuit Judge, in March, 1846, and on that trial the case was as follows:—

The plaintiffs gave in evidence a chattel mortgage upon the property in question, executed to them by one Abraham B. Vanderpoel, dated April 19, 1842, which had been duly filed in the proper town clerk's office. The instrument recited that Vanderpoel was indebted to the plaintiffs in the sum of \$498.72, being the amount of three promissory notes made by Vanderpoel, and held by the plaintiffs, and the mortgage was to become void if Vanderpoel should pay the debt by the first day of October then next. Evidence was given tending to show a just consideration for the notes. At the time the mortgage was given the property was on the farm of the mortgagor, and was used by one Mosher, who worked the farm on shares, under an agreement by which Vanderpoel was to furnish teams, stock and utensils. After the mortgage was given the property remained on the farm, and was used as before. On the 15th day of July, 1842, the defendant, as sheriff of the county of Columbia, sold the property in question by virtue of an execution against Vanderpoel, in favor of the Lafayette Bank, which was delivered to the sheriff on the 5th of May, 1842. The evidence tended to show that the plaintiffs asserted their claim under the mortgage at the sale, and forbid the sale.

It also appeared that on the 7th of May, 1842, the plaintiffs took from Vanderpoel a bond and warrant of attorney for the amount of the notes secured by the mortgage, upon which judgment was entered in the Supreme Court on the same day, and execution thereon was, by Vanderpoel's consent, issued immediately to one of the deputies of the sheriff aforesaid. It was also proved, after objection duly made and exception by the defendant's counsel, that it was agreed between the plaintiffs and Vanderpoel that the judgment should be taken as collateral to the mortgage.

One V. gave plaintiffs a chattel mortgage. Condition of the mortgage. Exec. on the prop. Pls. by V's consent took a T. P. their debt as further security. 1st. J. did not merge debt (not merge in itself. if it is a higher security than lien of mortgage in land or legal title of mortgage of chattel. Rule that T. mortgage debt does not apply to collateral. Secured debt is not gone tho' charged.

Case represents the law and is O.K. on
reason top of 749. The merger is simply
a change in the form of indebtedness
and we have seen - that extension
accompanied by change of form of
indebtedness does not discharge mtge
unless so intended. A partial
change in form v.s. extension does
not. Whether the change in form
is by mutual assent or operation
of law seems immaterial except that
in latter case less inference that
parties intended to discharge the
mtge.

The plaintiffs' execution, soon after it was issued, was levied upon the property in question, and the property was advertised for sale both under that execution and the one above mentioned in favor of the Lafayette Bank.

It also appeared that after the sheriff's sale above mentioned the plaintiffs made a motion in the Supreme Court for an order requiring the defendant, as such sheriff, to apply the proceeds of the sale on the judgment and execution in their favor. This motion was based upon an allegation that the execution of the Lafayette Bank, when first delivered to the sheriff, was directed to the sheriff of the county of Hudson (there being in fact no such county), and that the error was corrected and the execution re-delivered to the sheriff after the execution of the plaintiffs was issued. The motion was denied with costs.

The defendant's counsel requested the Circuit Judge to decide and charge the jury: 1. That the mortgage under which the plaintiffs claimed was fraudulent and void as against the judgment and execution of the Lafayette Bank. 2. That the judgment taken by the plaintiffs on the 7th of May, 1842, for the same notes secured by the mortgage, merged the notes and extinguished the lien of the mortgage. 3. That the issuing of execution upon that judgment, the levy upon the mortgaged property, and the motion to the Supreme Court to have the proceeds of the sheriff's sale applied upon that execution, were severally acts inconsistent with any claim under the mortgage, and destroyed all right to assert any such claim.

The Circuit Judge ruled that the question of fraud was one of fact for the jury to decide. That the judgment was not a merger or extinguishment of the mortgage, if it was taken as collateral merely; if not so taken, then that it was a merger. Upon the 3d proposition he refused to charge as requested. The defendant accepted, and the jury gave their verdict for the plaintiffs. The defendant moved in the Supreme Court for a new trial on bill of exceptions, which was granted by that court. The plaintiffs appealed to this court under the judiciary act of December, 1847.

JOHNSON, J. The question of the *bonâ fides* of the mortgage was properly submitted to the jury, and their verdict in favor of the honesty and fairness of the transaction is conclusive according to all the cases since *Smith v. Acker*, 23 Wend. 653.

The Circuit Judge was requested to charge the jury that the subsequent judgment on the notes operated as a merger of the notes and consequently avoided the mortgage. The Judge, however, charged that the judgment did operate as a merger of the notes and mortgage unless it was satisfactorily shown that the

{ judgment was taken as collateral to the mortgage, in which case it was not a merger.

The charge upon this point was in strict accordance with the rule laid down by the Supreme Court (1 Denio, 407) when this cause was before it on a former trial, and must be regarded as correct unless that court was then in error as to the true rule upon the subject.¹

It may, perhaps, well be doubted whether the judgment was a security of a higher nature than the personal mortgage; and, even if it were, whether it would operate to extinguish the mortgage and divest the mortgagees of the title they had acquired under it. It will scarcely be contended that in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished such mortgage. And yet a mortgage upon real estate is a mere security and incumbrance upon the land and gives the mortgagee no title or estate therein whatever. Whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. And if it be conceded that a judgment upon the original indebtedness would not extinguish a collateral security for its payment upon real estate, I do not see how it could divest a title to personal property acquired by purchase. A vested legal title, whether in real or personal property, is the highest of all securities—certainly higher than the mere lien of a judgment upon land, or the right of a plaintiff to personal property acquired by levy under an execution.

Although it is clear that the notes were merged in the judgment by operation of law, it does not, as I think, certainly follow that all the collateral securities would be extinguished. The debt is not yet satisfied. The notes may have been cancelled, but the debt was not, and until that is done it seems to me that all mere collateral securities, whether upon real or personal property, should be allowed to stand, especially titles to property acquired under instru-

"If then the judgment was intended as a collateral security to the notes and mortgage before executed, it would be clear that the notes and mortgage were not merged in or extinguished by the judgment, but remained a valid conveyance under which the plaintiffs could make title to the property mortgaged and sustain their action. [But] the judgment, which is a higher security than the notes and mortgage, or either of them, was between the same parties. It was, so far as the plaintiffs, the mortgagees, are concerned, for the same debt, and this appears on the face of the securities. Does not the law presume that the judgment was taken in satisfaction of the original debt? I am of opinion that it does."—Per Jewett, J., in opinion in the Supreme Court (pp. 412, 413).

ments where the parties stand in the relation of vendor and purchaser without fraud. The rule that security of a higher nature extinguishes inferior securities will be found, I apprehend, only to apply to the state or condition of the debt itself, and means no more than this—that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced lose their vitality. It has never been applied, and I think never should be, to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone. This most obvious and rational distinction seems to have been overlooked by the Supreme Court in the opinion to which I have referred.

ok.
there
ground.

It is unnecessary, however, to decide the question here discussed, as it was put to the jury substantially to find whether it was agreed or intended by the parties in entering up the judgment to cancel the mortgage; and I admit that if such had been the agreement and intention, there was sufficient consideration to support it, and that the mortgage must have yielded to the superior force of the agreement, whether express or implied.

Don't make
it unrec. to
decide.

The jury have determined by their verdict that the parties to the mortgage did not intend to cancel it, and that notwithstanding the judgment it remained a valid subsisting security.

Thus far, then, it seems to be established by the verdict that, at least up to the time of the execution being placed in the hands of the sheriff by the plaintiffs, the mortgage was a valid instrument in their hands, and vested in them the legal title to all the property it purported to convey, subject to be defeated only by payment and satisfaction, or voluntary waiver or surrender.

It remains to be seen whether the plaintiffs have in any way ^{3. Election pt} divested themselves of their title to the property thus acquired, or been guilty of any acts which would authorize the court to estop them from asserting their rights under the mortgage.

[The learned Judge examines this question at length, and comes to the conclusion that the plaintiffs have, by pursuing their remedy under the judgment, so dealt with the property in question as to preclude themselves from setting up their title to it under the mortgage.]

Excluded pt.

New trial granted.

Bush some Pierson utred certain prop. to secure notes. T. was later obtained in notes. Utred, T. & notes now belong to P. BUSH v. COOPER.

After notes outgo was given Bush was discharged in bank- HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI, 1853. (26 Miss. 599.)

utred. Later On appeal from the Superior Court of Chancery: Hon. Stephen Cocke, Chancellor.

After dis- The bill was filed by the appellee, as administrator of Maborn Cooper, deceased, for the purpose of subjecting lot No. 1 in square No. 9, in the suburb of St. Mary, of the town of Port Gibson, to the payment of two judgments held by the intestate P. appeller Bush.

Charge land in? bank- The bill alleges that the firm of J. O. Pierson & Co., consisting of J. O. Pierson and the appellant, with Eli C. Briscoe as their surety, on the 16th April, 1839, executed two promissory notes to W. T. and T. B. Dyer, one due in November, and the other in December, 1839.

Sold under a T. gotten vs. Pierson & Bush before discharge. Bush bought land with money. Had since disch. Wild land is subject to outgo. By bankrupt act discharge does not terminate being outgo, ret. So outgo not discharged. Nor does discharge alter the Estoppel from consent, in outgo deed by which the subsequently requested title accrues to benefit of outgo deed.

Since disch. Wild land is subject to outgo. By bankrupt act discharge does not terminate being outgo, ret. So outgo not discharged. Nor does discharge alter the Estoppel from consent, in outgo deed by which the subsequently requested title accrues to benefit of outgo deed.

That on the 17th March, 1840, the said J. O. Pierson & Co., in consideration that the said Dyers would extend the time of payment of said notes, executed to E. C. Briscoe and George W. Elmer, as trustees, a deed of trust, in and by which they conveyed said lot 1, in square 9, to said trustees to secure the payment of said notes. That subsequently the two Dyers obtained judgments on said notes, and that on the 22d January, 1845, they sold and transferred said judgments, notes, and deed of trust to Maborn Cooper for \$1,000, and that no part of said judgments has been paid. The bill then sets forth and attacks a sale of said property, under a judgment of Thomas et al. v. J. O. Pierson & Co. The bill then alleges that Pierson and Bush are discharged bankrupts, and that Briscoe is insolvent, and that the only hope of making any thing rests upon the deed of trust.

The bill then alleges that on the 21st October, 1844, said lot 1, in square 9, was sold at sheriff's sale, under a judgment rendered in June, 1838, in favor of Nelson, Carleton & Co. against J. O. Pierson & Co. and others, and purchased at said sale by the appellant Bush for \$1,033. It is then charged that Bush, the appellant, ought to have advanced the money at once for the protection of said property under the deed of trust; that his purchase is fraudulent and void, or at any rate that it enures to the benefit of the deed of trust.

Bush, the appellant, admits in his answer the making of the notes, and the execution of the deed of trust. He then sets up and pleads his discharge as a bankrupt, on the 20th February, 1843, and files his certificate of discharge, as exhibit No. 1, to his answer. He admits his purchase of said property at sheriff's sale on the

He admits his purchase of said property at sheriff's sale on the

He admits his purchase of said property at sheriff's sale on the

He admits his purchase of said property at sheriff's sale on the

(1) In full report it appears was a grant deed wh. by statute is held to contain covenants of warranty, & incumbrances, & quiet enjoyment. Court held liability - on these was not discharged by the discharge in bankruptcy because they were contingent claims for unlig. dam. & so not provable in bankruptcy.

(2) All the authority is with this case. Seems almost precisely same question as St. Lue. Possibly some of the Courts that hold Contra there would hold Contra as to this case. So for ~~several~~ some Courts that hold when debt is barred by St. Lue. the wife is gone have held that when debt is barred by bankruptcy proceedings wife is not gone. Includes Ill.

Might distinguish. If cred. keeps his wife he guiltily can't fear in bankruptcy - or he may surrender & prove. This common provision perhaps impliedly says cred may keep his wife free of discharge. Some bankruptcy acts have expressly excluded any discharge of liens or mortgages.

21st October, 1844, and relies on the sheriff's deed to him. He avers that he paid for said property with money acquired by him since his discharge in bankruptcy, and claims title to it against all the world.

The court below sustained the prayer of the bill, and Bush appealed to this court.

Mr. Justice HANDY delivered the opinion of the court.

This bill was filed by the appellee in the Superior Court of Chancery, to foreclose a deed in trust executed by the appellant on the 17th March, 1840, conveying certain real estate in the town of Port Gibson to trustees to secure the payment of two promissory notes made by the appellant, and afterwards transferred to the appellee. The facts necessary to be taken into view in considering the questions presented for determination are as follows:—

The notes secured by the trust deed were due in January and February, 1841; and in November, 1842, a judgment at law was rendered upon them against Bush, which judgment and the deed in trust were afterwards transferred to the appellee, and remain unpaid. The deed, in conveying the property, contains the words "grant, bargain, and sell," but contains no other covenant of warranty in express terms.

The appellant was discharged as a bankrupt in February, 1843; and in October, 1844, he purchased the property embraced in the deed in trust at sheriff's sale, under an execution on a judgment rendered in June, 1838, against the appellant, and which was unsatisfied, for the sum of \$1,033, by means acquired by him after his discharge as a bankrupt; and in virtue of that purchase, he now claims to hold the property by title paramount to the lien of the deed in trust. On the contrary, the appellee claims that the property is subject to the payment of the debt secured by the deed in trust, notwithstanding the discharge of the appellant as a bankrupt, and that the appellant's purchase, under the prior incumbrance, cannot be set up by him to defeat the security of the deed in trust.

The first question to be settled is, whether the discharge of the appellant from the debt, by his certificate as a bankrupt, extinguished the deed in trust.

It is insisted on his behalf that the deed was but a mere incident to the debt, and that whatever discharged the debt necessarily destroyed the deed, because the security could not exist where the debt, which was its foundation and support, was discharged. This is undoubtedly well sustained by modern decisions, as a general rule, but it is not without exceptions. It is held to apply in all cases where the debt has been actually paid, or where it was

And sum-
mary of
facts.

not supported by a valid legal consideration, or where the debtor *ex æquo et bono* is discharged from its payment. But it is held not to apply to a case where an action upon the debt has been barred by the statute of limitations, and that the creditor may proceed to foreclose his mortgage, notwithstanding the bar of the debt by the statute. (*Miller v. Helm*, 2 S. & M. 697; *Miller v. Trustees of Jefferson College*, 5 Ib. 650; *Bank Metropolis v. Guttschlick*, 14 Peters, 19; *Thayer v. Mann*, 19 Pick. 535.)

In addition to this, the objection is fully met by the second section of the bankrupt act of Congress of 1841, which provides that "nothing in the act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal," &c. From this it is manifest that, while the privilege was granted to the debtor to be personally discharged from the debt, any security which the creditor might have, consisting of a lien on property, was left in as full force as though the debtor had never been discharged from the debt, for the security of which the lien was made.

The second question, then, presented is, Whether Bush is estopped by the deed from setting up his title acquired under the judgment, which was a lien existing at the date of the deed, in opposition to the title conveyed by the deed? This is a question of great importance in its direct and collateral bearings, and it has been carefully considered by the court.

[The Court then discusses at length the question of the effect of the appellant's discharge in bankruptcy upon the estoppel arising from the covenants in his deed of trust, and concludes as follows:]

It follows from this view of the subject that the appellant was not discharged from his covenants in the deed, and consequently that he is estopped from setting up his subsequently acquired title against the claim of the appellee. As a legal proposition this conclusion is well sustained by expositions given to the bankrupt laws by very high authorities. In an equitable point of view, the position of the appellant would not be more favored. After having pledged the property as a security for the payment of the debt, he would scarcely be heard, in point of mere equity, to set up a claim to the same property, founded on the existence of a prior lien which he had covenanted against, and thereby deprive his creditor of the security he had given, and appropriate the property to himself.

The decree of the chancellor is affirmed.¹

¹*Chamberlain v. Meeder*, 16 N. H. 381 (1844).
Exactly accord.

? what covenants.



Notes on general? are given to Case off. on
p. 769.

Here utge contained no covenant to pay.

753 →

Notice that Court turned down notion that
St. Lin. having seen on note raised a pre-
sumption that note paid & so barred utge.
That was idea of the 7 Wred. Case. The
presumption of payment, by the cases,
generally does not arise until 20 yrs
have elapsed by analogy to old rule
as to specially debts. For details see
notes to next case.

PRATT v. HUGGINS.

SUPREME COURT OF NEW YORK, 1859.

(29 Barb. 277.)

Note bridge. ⁷⁵³ latter, round
deal. 6 yrs but not 20
NS. Elapred. 70¢ still due.
ORK, 1859. Held utige way to
Empred. the St. L. has
found note. St. only, cir-

This was an action to foreclose a mortgage upon premises in Greene county, dated February 5, 1835, executed and delivered by the defendant, William T. Huggins, to Joseph Huggins, to secure the sum of \$250, payable on the 1st of February, 1836, and assigned by the latter to the plaintiff on the 14th of March, 1836. The mortgage was on the same day acknowledged, and on the 9th day of February recorded in the clerk's office of the county of Greene. Contemporaneously with the mortgage and to secure the same debt, William T. Huggins executed and delivered to said Joseph Huggins a promissory note of like date, amount and time of payment as the mortgage, and payable to Joseph Huggins or bearer. The mortgage was under seal, and the note was not under seal. The defendants, among other things, averred that the note was paid and satisfied, and also that the note (and consequently the mortgage) was barred by the statute of limitations, by the failure to commence an action thereon within six years after the cause of action accrued. The action was commenced on the 6th day of September, 1855. The cause was tried by the Hon. Deodatus Wright, then a justice of the Supreme Court, without a jury, at a Circuit Court held in the county of Greene in November, 1857. Evidence was given tending to show the consideration and object of the bond and mortgage, and on the part of the defendants, to show that they were satisfied and paid; and on the part of the plaintiff, that an unpaid amount of about \$70 remained due thereon. The justice came to a conclusion favorable to the plaintiff on the latter point, he finding that a portion of the amount secured by the mortgage was still due and unpaid; but holding, also, that the right to recover was barred by the statute of limitations, he gave judgment for the defendants, with costs; from which judgment the plaintiff, having duly excepted to the rulings of the judge, appealed to the General Term. The remaining facts, so far as they are material, sufficiently appear in the opinions which follow.

HOGEROOM, J. The facts of this case lie within a narrow compass. The plaintiff, by action commenced in 1855, seeks to foreclose a mortgage under seal, executed in 1835, for a debt falling due in 1836, which mortgage was accompanied by a promissory (unsealed) note to secure the same debt. The mortgage contains no covenant to pay, but the condition is that the instrument shall

be void if the above sum, with interest, is paid on the 1st of February, 1836, "in the manner particularly specified in the condition of his (the mortgagor's) certain bond or obligation bearing even date herewith." The mortgage was duly acknowledged and recorded. The answers interposed several defenses; and among others, the defense of payment; and that the plaintiff's cause of action was barred by the statute of limitations, in consequence of its not accruing within six years before suit brought. The justice before whom the cause was tried, without a jury, came to the conclusion, upon the evidence, that there was an unpaid balance due on the note, and that he should have given judgment for the plaintiff but for the fact that more than six years had elapsed since the said note became due, and the cause of action thereon accrued prior to the commencement of this suit; and for that reason he gave judgment for the defendants. The case therefore presents the question whether a debt secured by a sealed mortgage and an unsealed note can be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due. As has been said, there is no covenant in the mortgage to pay the debt; but at the same time the debt, its amount and the time of payment, are specified in the mortgage; and it is provided that in case "default shall be made in the payment of all or any part of the said principal sum of two hundred and fifty dollars, or the interest thereof, at the time or times when the same ought to be paid as aforesaid, that then, and in such case," the mortgagee may sell and dispose of the premises, &c. The true question, therefore, would seem to be, has the mortgage been paid? or, rather, in this case, is the lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgment of the debt, conclusive evidence of payment? The justice trying the cause has come to the conclusion, upon the evidence, that a part of the debt is actually unpaid. Is there a legal bar to giving effect to that conclusion by rendering judgment for the plaintiff, in consequence of the lapse of time before mentioned? If this is substantially an action upon the note, then it is barred, for it is an action upon simple contract and must be brought within six years. (Code, § 90.) And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids the action. The remedy is taken away. But this is not in terms or effect an action upon the note. The mortgage would be good without the note. If there had been no note, but only the evidence of the debt recognized in the mortgage, is there any doubt that the mortgage could have been enforced after the debt became due, and for twenty years afterwards? The only ques-

tion would be, was there a debt remaining unpaid—a security upon real estate—and was the lien enforced during the period that the law gives it legal existence? The additional recognition of the debt, in the shape of a promissory note, ought not to detract from its force. It is said that the note is the principal, and the mortgage only the incident; that is, that it is given only as a security for the note. In a certain sense, this is true. But in fact the debt itself is the principal thing, and the note is one form of security for, or evidence of, the debt, and the mortgage another.

Suppose the mortgage contained a covenant to pay the debt, would it be any the less the principal thing than the note? True, the note (if negotiable) would have some facilities for an easy transfer, and might be negotiated independent of the mortgage. If so transferred, it would in law carry the mortgage with it, and so would the mortgage carry the note with it. The payment of either would be the payment of the other, except so far as a *bonâ fide* holder of the note for value is concerned, who might, under the law applicable to commercial paper, be protected. It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for

the law allows a suit upon it and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption; suffered to be overthrown, it is true, only in one way, and that is, by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy. It is an arbitrary and an artificial rule, not to be carried, I think, beyond the well-defined limits of the statute itself. The case of *Jackson v. Sackett*, 7 Wend. 94, is much relied on as decisive authority in support of the bar. That was ejectment upon a forfeited mortgage, secured also by a note. The tenor of Mr. Justice Sutherland's able opinion is towards regarding the lapse of six years, unexplained, as sufficient evidence of payment. But he held that the bar was not absolute, and that circumstances tending to show that the note was unpaid were proper for the consideration of the jury, and a new trial was in fact granted for withdrawing the case from the jury. We are not precisely apprised by the case at bar what circumstances here exist; but we are told in the case itself that the plaintiff gave evidence "tending to show that there was due upon the mortgage about the sum of \$70; that no part of the said sum, or the interest thereon, had been paid." And the judge also says. "I am entirely satisfied from the evidence that there is an unpaid balance due on the note, and should have decided in the plaintiff's favor, except for the legal bar above stated." The late chancellor (Walworth) doubts, and even denies, the authority of the last cited case, in *Heyer v. Pruyn*, 7 Paige,

Silly.
Don't say
is presump-
tion as to
note at end
of 6 yrs. Only
the presump-
tion (really bar)
as to note.

So evidently
did not

465, and goes so far as to say that it "cannot be law." The cases in Massachusetts and Connecticut, and one in Kentucky, hold that notwithstanding that "the note may be barred by the statute of limitations, yet if it has not been paid, the mortgagee has his remedy on the mortgage." (*Thayer v. Mann*, 19 Pick. 535; *Bush v. Cooper*, 26 Miss. [4 Cush.] 599; *Eastman v. Foster*, 8 Metc. 535; *Baldwin v. Norton*, 2 Conn. 163; 14 B. Monroe [Kentucky]. 307. See also 2 Cox's Chancery Cases, 125; *Spears v. Hartly*, 3 Esp. R. 81, 2; Hilliard on Mortgages, 21, 22.) The case of the *Bank of the Metropolis v. Guttschlick*, 14 Peters, 19, declares a kindred and nearly analogous principle. The case of *Waltermire v. Westover*, 14 N. Y. R. 16, has also, particularly in the reasoning of Mr. Justice Selden, some bearing upon the present case. In that case the lien of a justice's judgment, which according to the statute would be barred after six years for the purpose of bringing an action thereon, was, when a transcript was filed in the county clerk's office, recognized as of equal validity and duration with that of a judgment originally entered in the common pleas, and extended to ten years as against subsequent creditors. It is true much stress was laid upon the language of the statute giving such a judgment the same force and effect as a judgment of the common pleas, but much stress was also laid upon the fact that there was nothing to prevent the enforcement of such a lien, except the language of the law of limitations; and it was considered that that language might be appropriately limited to cases directly within its terms; that there was reason for saying that the debt still remained, notwithstanding the statute had cut off the remedy when resorted to in the shape of an action. A distinction was drawn between the institution of a suit upon the justice's judgment and the enforcement of it as a lien upon real estate; and I think here a distinction may be drawn between an action upon the note for the purpose of enforcing a personal liability and an action upon the mortgage for the purpose of enforcing the lien upon the real estate. This question, in this State, may be said to be nearly *res nova*, and I feel authorized to follow the weight of judicial authority elsewhere, resting, as I think it does, upon principle, especially as the case in 7th Wendell is not directly hostile to the rule here suggested. The judgment should be reversed and a new trial granted, with costs to abide the event,

GOULD, J. At the December term, 1858, this case was submitted upon briefs, without oral argument. And on that submission I wrote this brief opinion:

"The mortgage is defeasible on condition that \$250 be paid. The statute of limitations effects not the right to the money, but the

remedy therefor. It says to the creditor, not 'you are paid,' but 'you cannot call upon a court of law to enforce payment.' And the defense in this case is, not that the mortgagor has complied with the condition, but that, if he were sued at law on the note, the statute of limitations could be interposed as a legal bar to a recovery. Very true; but he is not sued on the note, and the plea (by answer) does not pretend that he has performed the condition; which, and which only, would defeat the mortgage-title. He does not bring himself within the equity of the defeasance; and the title remains good, under seal, it is asserted, within twenty years, and it can be defeated only according to the tenor of the defeasance. This view is sustained in *Heyer v. Pruyn*, 7 Paige, 465, and is precisely and very satisfactorily covered by the case of *Thayer v. Mann*, 19 Pick. 535. There should be a new trial."

As this opinion was thought to overrule the case of *Jackson v. Sackett*, 7 Wend. 94, my associates deemed it best to have a full argument before coming to such a result; and on such argument it now comes up.

My views remain unchanged, and though it is rather difficult to say what the case of *Jackson v. Sackett* did decide, still, if to order a new trial in this case that case must be reversed, I should order the new trial. That case founds its reasoning on the basis that the statute of limitations is a defense, because the law, from lapse of time, presumes payment. I do not so understand the statute of limitations. I understand mere lapse of time to be a full defense, because the statute says so: *Ita lex scripta*; and there is need of no such presumption to help out an absolute rule. But that case departs from its premise of presumption of payment being merely the basis of a positive statute bar, when it says (at p. 100), "but the presumption arising from lapse of time is but evidence to the jury, from which they may infer that the debt has been satisfied." This, though true on a question of fact (as to actual payment), cannot be said of a legal presumption arising from an admitted fact. The lapse of time was either a bar or no bar. If, by the statute, a bar, it needed no help from presumption. If not, by the statute, a bar, no presumption could help it.

But since my first opinion was written there has been published a decision (given indeed in 1857, but not then printed) by which the Court of Appeals clearly takes the view that I did. (*Waltermire v. Westover*, 4 Kern. 16.) At page 20, "such statutes act upon the remedy merely, and not upon the debt." And at pages 21, 2, "If statutes of limitation do not discharge the debt, but act exclusively upon the remedy, upon what principle of interpretation is it to be held that this statute, which is in terms confined to the

So by no not
presumpt. of
pay. Sec. 2 to
note - OK.

remedy by action, operates to annihilate a remedy by execution? The statute does not operate by producing any presumption of payment, but is a mere statutory bar, founded in principles of public policy."

In the case before us, the statute of limitations (where it speaks of the lapse of six years as a bar) is in terms confined to an action at law on the note, and cannot operate to annihilate a remedy on the mortgage, by which a court of equity cuts off the equity of redemption. The decision in 4th Kernan is abundant authority for ordering a new trial in this case.

The judgment of the circuit court should be reversed and a new trial ordered, costs to abide the event.¹

WRIGHT, J., concurred.

New trial granted.

*Action in Eq. to enforce vendor's lien
must have been after sale. Held does
not lie. Debt is barred at law & cause
of action is same in both Eq. & law.
In such case Eq. Sup. by action shall be
barred where law action BORST v. COREY.*

is. Such also was COURT OF APPEALS OF NEW YORK, 1857.

*prior law. Action is not
on lien but for debt. Lien* (15 N. Y. 505.)

*is merely
incident.
Mtg. is not
same case.
Mtg. is under
deed & con.
action is Eq.
action. Cause
of action,
Debt is not
gone but all
action is for
it and barred
of which
this is one.*

On the tenth of August, 1837, the plaintiff and the defendant, Samuel Newkirk, as executors of the last will and testament of James Halliday, deceased, conveyed to the defendant, David P. Corey, a piece of land in Montgomery county for \$1,600, subject, however, to a mortgage thereon for about \$635, and this action was commenced August 5th, 1847, in the Supreme Court, on the equity side, to obtain a sale of the premises, by virtue of the equitable lien for the purchase price. The complaint in the action set forth the conveyance of the premises by the executors, alleged that no part of the purchase price had been paid by the grantee except the amount of the mortgage, and asked for a decree that the premises be sold and the purchase price and interest be paid from the proceeds of the sale. The complaint further alleged that the executor, Newkirk, had refused to join with the plaintiff in the commencement and prosecution of the action, and was therefore made a defendant.

The defendant, Newkirk, suffered the bill to be taken as confessed. The defendant Corey, by his answer, alleged that prior to the delivery of the deed to him he paid the purchase price of the land in full, except the amount of mortgage thereon, and had subse-

¹Belknap v. Gleason, 11 Conn. 160 (1836); Hulbert v. Clark, 128 N. Y. 295 (1891).

- (1) Might of authority - is against case.
(2) Much same question as the utge case.
Of course Courts are not very favorable to Vendor's lien but seem not to have let their ill-will toward their work in this case.

Court's argument that rule as to utge rests on their being under seal is unsound. Latest Eng. case applies it to an oral chattel utge. Idea is not that utge is superior but that it is dif. Idea is not that instruments under seal run 20 yrs, but that it is a purely equitable right (foreclosure) & no st. Lien. to it at all (until lately).

(3) i. Court's further arg. is weak. Lien must fall with debt, but debt hasn't fallen.
ii. Construction of the statutes was rather stretched. Idea legislature had in mind was that where are two remedies on same rt (dams & spec. perf. on contract, for example), then if legal relief can't be gotten Equit relief can't. Has no application to our case where are two rights.

(3) But might well be held that since law created Vendor's lien it can end it when justice requires its termination & so when debt barred.

quently paid the mortgage; and that he had not, at any time within six years next prior to the commencement of the action, been indebted to the executors or either of them, for or on account of the purchase price of the premises, or promised to pay the same; and that no cause of action had accrued for the same within the six years. To this answer a general replication was put in.

The action was tried before referees, and they found that more than six years had elapsed since the sale of the premises in question, prior to the commencement of the action, and decided that the plaintiff be nonsuited, on the ground that the cause of action, to enforce which the suit was brought, was barred by the statute of limitations. No bond or mortgage, or other written instrument, was taken to secure the payment of the purchase price of the land, and it does not appear that any credit was given therefor.

Judgment having been entered on the report, the plaintiff appealed therefrom; the Supreme Court, at general term, in the third district, affirmed the judgment, and the plaintiff appealed to this court.

BOWEN, J. The purchase price of the land in question was due and payable on the conveyance of the land to the defendant Corey, and as this action was not commenced until more than six years after the conveyance, and as no promise to pay was shown to have been made within six years, the statute of limitations would have been a complete bar to an action at law to recover the purchase price. (2 R. S. 295, § 18.)

This action, however, was one of equitable cognizance. At the time of the commencement of the action, the relief sought to be obtained in the manner applied for, that is, by a sale of the premises under the equitable lien thereon for the purchase price, could have been awarded by a court of equity only.

An action at law, if commenced at any time within six years after the conveyance, could have been maintained against the defendant Corey, in which a judgment against him personally would have been rendered. The object of such an action, and the relief sought for therein, would have been the recovery of the unpaid purchase price of the land. The same relief, and no other or different, is sought to be obtained in this action, and a court of equity was resorted to solely for the reason that courts of common law jurisdiction could not award relief otherwise than by a judgment against the defendant personally. The same facts which would constitute a defence to the action at law would also be a defence to this action, unless the statute of limitations be an exception.

So, too, the cause of action, to wit, the non-payment of the purchase price of the land, is the same, whichever court is resorted to.

It is true that, to sustain the suit in equity, the plaintiff must

bring to his aid the equitable lien given by law, while the action at law can be sustained without reference to such lien. But the lien is merely an incident to, and must stand or fall with the debt. The debt is the basis or foundation of the lien. The latter cannot exist without, or independently of the former. In the suit to enforce the lien, the cause of action, and the only substantial cause of action, is the debt.

The forty-ninth section of the title of the Revised Statutes entitled, "Of the time of commencing actions" (2 R. S. 301), provides that "whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, of any cause of action, the provisions of this title, limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits hereafter to be brought for the same cause in the Court of Chancery."

I do not see why this case does not come within the letter of the above provision. It certainly does, if I am right in supposing that the defendant's indebtedness for the purchase price of the land constitutes, in the language of the statute, the plaintiff's "cause of action."

It is claimed by the plaintiff's counsel that if the language of the forty-ninth section is sufficiently broad to include this case, the fiftieth section excepts it therefrom. This section provides that "the last" (§ 49) "section shall not extend to suits over the subject matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject matter is not cognizable in the courts of common law."

The term "subject matter" of suits, as used in this section, is synonymous with the term "cause of action," contained in the preceding forty-ninth section. No other definition can be given to the phrase as applicable to this case. It is said that "the subject matter" of this suit is the equitable lien, of which a court of law cannot take cognizance; while, if a suit at law had been brought to recover the purchase price of the land, "the subject matter" of the action would have been the debt. But, as before shown, the lien is a mere incident to the debt, being given solely to secure its payment. If the lien can be said to be, in any sense, the "subject matter" of this action, it is so merely as incidental to the debt, the latter being the principal and fundamental "subject matter" of the suit, as much so as it would be of an action at law to recover the debt. I do not think that the fiftieth section excepts this case from the operation of the previous section.

Prior to the Revised Statutes there was no statute in this state limiting the time for commencing actions in courts of equity. Yet,

previously to the adoption of those Statutes, it was frequently held that, in cases where there was a concurrent jurisdiction at law and in equity, time was as absolute a defence to the action in equity as to one at law; not on the ground of expediency, or as a matter of discretion founded on analogy to the statute of limitations, as was the case in some actions of purely equitable cognizance, but in obedience to the statute. (*Rosevelt v. Mark*, 6 John. Ch. R. 266; *Kane v. Bloodgood*, 7 id. 90; *Murray v. Coster*, 20 John. 576; *Sawyer v. De Meyer*, 2 Paige, 574; *Humber v. Trinity Church*, 7 id. 195; 24 Wend. 587; *Story's Eq.*, § 529.)

I think this case comes within the principle established by the above authorities, and that, independently of the statutory provision limiting the time of commencing actions in courts of equity, it should be held that the six years' limitation to actions at law constitutes a defence to this action. The provision of the Revised Statutes limiting the time of commencing actions in courts of equity was adopted as declaratory of the law as it then existed, and not as introducing a new rule. (3 R. S. 705, revisers' notes.)

It would be an anomaly if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt, when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other.

It has, however, been held that where a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debts was no bar to an action to foreclose the mortgage. (*Balch v. Onion*, 4 Cush. 559; *Thayer v. Mann*, 19 Pick. 535; *Elkin v. Edwards*, 8 Geo. 325; *Heyer v. Pruyn*, 7 Paige, 465.)

But there is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce such a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom. No action at law can be predicated upon the mortgage, to collect the debt secured thereby, unless there is contained therein a covenant to pay the debt. A debt secured by deed is said to be of a higher nature than one by simple contract. On the contrary, the equitable lien is neither created or evidenced by deed, but arises by operation of law,

and is of no higher nature than the debt which it secures. It must coexist with the debt and cannot survive it.

It is true, as claimed by the plaintiff's counsel, that the statute of limitations does not extinguish the debt; it only bars the remedy. But the remedy by action at law is no less barred than that by suit in equity to enforce the lien. The *Mayor &c., of New York v. Colgate*, 2 Kern. 140, is relied upon by the plaintiff as an authority sustaining his position. That was an action for the collection of an assessment to defray the expenses of improving a street in the city of New York, under and by virtue of a lien upon certain lands in the city deemed to be benefited by the improvement, and upon which the assessment was made. The action was not commenced until more than six years after the assessment was made, and had become due and payable, and the six years' limitation was set up as a defence to the action.

The statute authorizing the assessment, and prescribing the remedies for its collection, provided that the sums thus assessed should be a lien or charge upon the houses and lots in respect to which the assessment was made, and might be sued for and recovered with costs, in like manner as if such houses and lots were mortgaged to the corporation for the payment thereof. The assessment was thus made, in effect, a mortgage with all its incidents, one of which was that payment was not to be presumed until the expiration of twenty years; and it was upon that ground that Judge Denio held that the six years' limitation did not apply, while Chief Judge Gardiner based his opinion on the ground that the assessment was in the nature of a judgment. In either view, the case is distinguishable from the one under consideration.

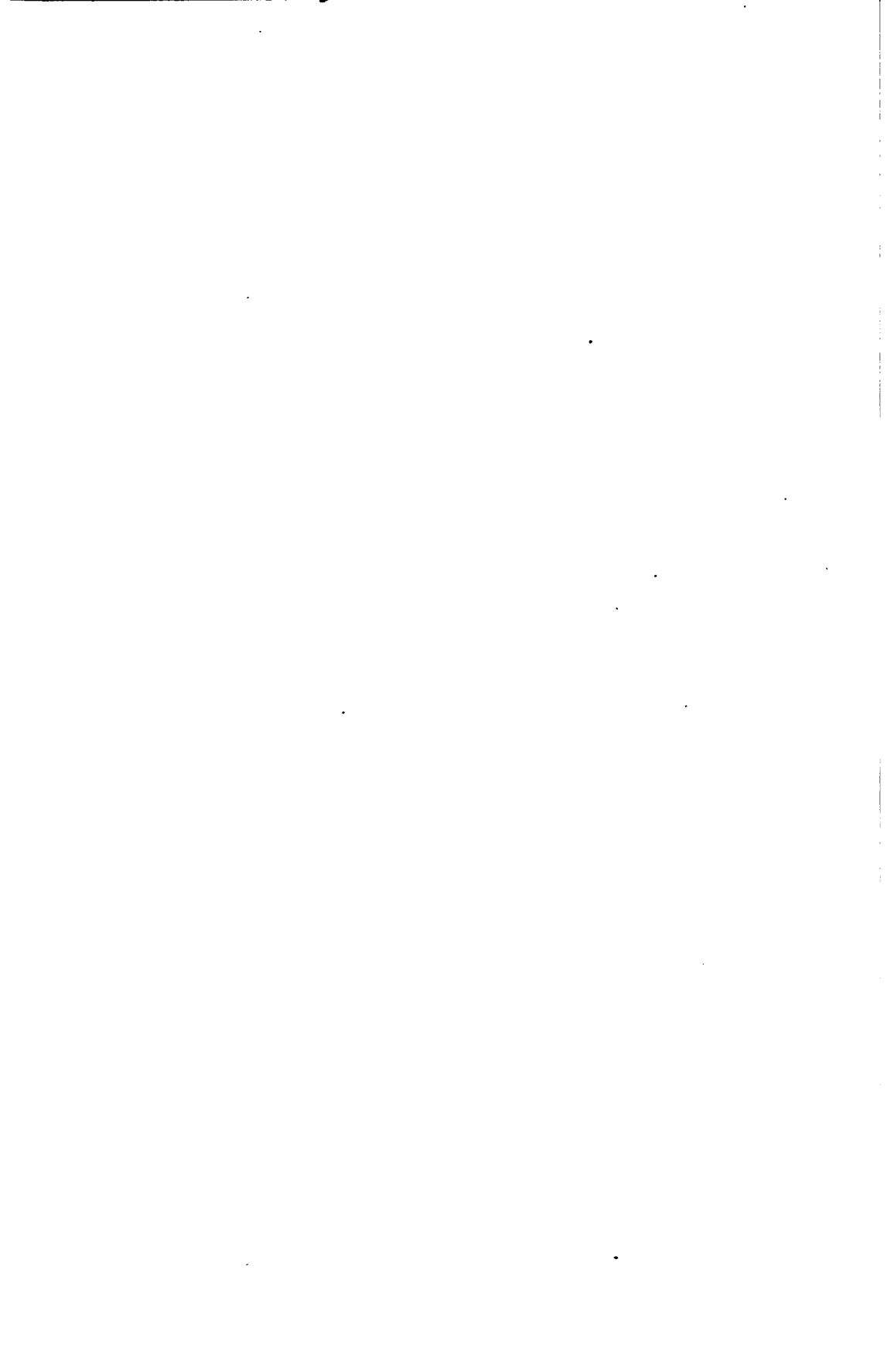
I think the judgment should be affirmed.

DENIO, C. J., delivered an opinion for affirmance upon substantially the same grounds as those stated by Bowen, J.

All the judges except *Brown, J.* (who did not vote), concurring in this opinion.¹

Judgment affirmed.

¹*Trotter v. Erwin*, 27 Miss. 772 (1854), accord. *Lingan v. Henderson*, 1 Bland. Ch. (Md.) 236 (1827), contra. And see *Hulbert v. Clark*, 128 N. Y. 295, 300, where it is said of *Borst v. Corey* that "the reasoning by which the result was reached in that case is not altogether satisfactory."



(1) Case sometimes cited as adopting the Ill. rule that when debt barred foreclosure follows. Of course does not. Here St. Lins. was same on both, so clear. In later case Calif. held could sell under a form of a sale tho both debt & foreclosure barred. & then that position is overruled.

(2) How far does revival of debt also revive mortgage.

Can both ways.

a. Revival of debt revives mortgage. But cases^{are} in states where bar of debt can mortgage & go on incident theory.

b. Can't be any revival vs prior purchasers of E.g. redemp. w.o. their consent. That is one case. Clear.

c. But if mortgage revived while he still owned then purchasers of E.g. wd take subject to revival.

d. A portion mortgage may extend time if St., before it has fully run, or is himself & land in his hands.

e. But should not be allowed to extend St. as in d. if he has previously sold E.g. redemp.

Defts gave plaintiff a note & mortgage to secure it. Later they sold the prop. & the deed executed two mortgages on it to interest & remove. At law in Cal. bars all actions on cont. in

LORD V. MORRIS.

SUPREME COURT OF CALIFORNIA, 1861.

(18 Cal. 482.)

Plaintiff appeals.¹

FIELD, C. J., delivered the opinion of the Court, BALDWIN, J., and COPE, J., concurring.

The questions presented by the record for determination are: first, whether, when an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the Statute of Limitations, the mortgagee has any remedy upon the mortgage; and second, whether a party having a subsequent mortgage upon the same premises, executed after the statute has run against the note, can interpose the plea of the statute in a suit to foreclose the first mortgage, and thus secure a priority of lien for his subsequent mortgage. The facts of the case are these: On the fifth of May, 1855, the defendants executed to the plaintiff a mortgage upon the premises described in the complaint, to secure their promissory note to him of the same date, for the sum of four hundred dollars, payable in three months with interest. The mortgage is not set forth in the record, nor are its contents given. The complaint only alleges that it is of the premises in fee, and contains a clause authorizing the plaintiff, upon default in the payment of the note, to cause a sale of the premises in the manner provided by law, and to retain from the proceeds the amount of the note and interest. We shall assume, therefore, that it is in the common form in use in this State—that of an absolute conveyance, with a condition underwritten that it is executed as security for the note, and will become inoperative and void upon its payment at maturity; otherwise, remain in full force. The mortgage was duly recorded in the office of the Recorder of the county where the premises are situated, within two days after its execution. On the eighth of August, 1855, the note matured, and on the eighth of August, 1859, the period of limitation within which, by the statute, an action could be commenced upon it, expired. Subsequently to this, and on the eleventh of May, 1860, the defendants indorsed over their signatures, upon the back of the note, a memorandum to the effect that for value received they “renew, revive, and agree to pay” the note and debt. It would appear that subsequent to the execution of the mortgage, Morris, one of the defendants, disposed of his interest in the prem-

¹The opinion only is here given.

have not priority over mortgages of interest known. St. L. have note & mortgage at same time. No def. is made as to Cont. under Seal. New from revised note but not mortgage as loaned was in other hand where right debt ed not affected.

ises, for the petition of intervention, and the findings of the Court mention Goodman, the other defendant, and two other persons as being the successors of the defendants. We infer from this, and shall so assume in the consideration of the case, that these parties held the interest of the mortgagors in the premises, and it matters not for the purposes of the appeal in what mode the interest was acquired. Having such interest, they executed on the nineteenth of January, 1860, two mortgages upon the premises, one to the intervenors to secure their promissory note of the same date for \$4,894, payable on or before the fifth of June, 1860, with interest, and the other to one Polson to secure their promissory note to him for \$2,185, payable three months after date with interest. This last note and mortgage were assigned to the intervenors, and in July, 1860, both of the mortgages were foreclosed, and the usual decrees in such cases entered. In December, 1860, the present suit to foreclose the first mortgage was commenced, and the owners of the second and third mortgages filed their petition of intervention, alleging that the remedy of the plaintiff upon the note and mortgage to him was barred by the statute, and that the lien of the mortgage was extinct previously to the nineteenth of January, 1860, and if the note had been revived that such revival did not affect the extinct lien of the mortgage, or not in such manner as to give it any priority over the liens of the mortgages owned by them. The Court held that the liens of the intervenors must be first satisfied out of the proceeds of the mortgaged property, and the lien of the plaintiff be postponed until such satisfaction, and ordered judgment to that effect.

The Statute of Limitations of this State differs essentially from the statute of James I., and from the statutes of limitation in force in most of the other States. Those statutes apply in their terms only to particular legal remedies, and hence Courts of Equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases Courts of Equity are said to act merely by analogy to the statutes, and not in obedience to them. Those statutes as a general thing also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts—that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes, where specialties are mentioned, as in the statutes of Ohio and of Georgia, the limitation is generally fixed either at fifteen or twenty years. The case is entirely different in this State. Here the statute applies equally to actions at law and to suits in equity. It

is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action "upon any contract, obligation, or liability founded upon an instrument of writing," except a judgment or decree of a Court of a State or Territory, or of the United States, to be commenced within four years after the cause of action has accrued. It matters not whether damages be sought for a breach of the contract, and thus an action at law be brought, or a specific performance be prayed, and thus a suit in equity be commenced: the proceeding must in either case be taken within the limitation designated. (See *Pearis v. Covillaud*, 6 Cal. 617.) The statute, after prescribing certain periods within which actions upon judgments, upon simple contracts, for relief on the ground of fraud, and for other causes, shall be brought, declares in general terms that "an action for relief," not thus provided for, must be commenced within four years after the cause of action shall have accrued—covering all cases where equitable or other relief may be sought.

A mortgage in this State also differs materially from a mortgage at common law, or a mortgage in our sister States. At common law a mortgage of real property was regarded as a conveyance of a conditional estate, which became absolute upon condition broken. It gave to the mortgagee, except as otherwise stipulated by provisions inserted in the instrument, a present right of possession. Upon it the mortgagee could enter peaceably, or bring ejectment, or a writ of entry; and in those States where the common law view has been modified by considerations arising from the real object of the instrument and the nature of the transaction, it is still generally held that, as between the parties, it passes the fee and gives a remedy to the mortgagee for the possession, though as to third persons it constitutes only a lien or charge, and leaves the mortgagor the owner of the premises. Thus in *Ewer v. Hobbs*, 5 Met. 3, Chief Justice Shaw, in delivering the opinion of the Supreme Court of Massachusetts, after stating the object of a mortgage, said: "Hence it is that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee, because that construction best secures him in his remedy, and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor." And in the subsequent case of *Howard v. Robinson*, 5 Cush. 123, the same dis-

In Calif. mortgage is a lien.

tinguished Justice said: "Although, as between mortgagor and mortgagee, it is a transmission of the fee which gives the mortgagee a remedy in the form of a real action and constitutes a legal seizin, yet to most other purposes a mortgage before the entry of the mortgagee is but a pledge and real lien, leaving the mortgagor for most purposes the owner." The doctrine with respect to mortgages is very different in this State. Here a mortgage is regarded as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to an action of ejectment, or to a writ of entry for their recovery. The language of the statute is express that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale. (See Pr. Act, sec. 260; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, *id.* 428; *Johnson v. Sherman*, 15 *id.* 293; *Goodenow v. Ewer*, 16 *id.* 464; *Boggs v. Hargrave*, 16 *id.* 563; *Fogarty v. Sawyer*, 17 *id.* 592.)

From this statement as to the Statute of Limitations, and the operation of a mortgage upon the right of possession in this State, it is evident that the decisions cited from the reports of other States, to the effect that a mortgagee has a remedy upon his mortgage after the Statute of Limitations has run upon the promissory note for the payment of which the mortgage was executed, have no application to the questions presented for consideration in the case at bar. Those decisions are founded upon distinctions made by the statutes of limitations of those States which do not exist in the statute of this State, or upon the right of possession which there accompanies the ownership of the mortgage. Thus in *Elkins v. Edwards*, 8 Geo. 326, which was a suit for the foreclosure of a mortgage, the Supreme Court of Georgia said: "Because the remedy on the note is barred by the statute in six years, it does not follow that the creditor's remedy on the mortgage, being a sealed instrument, is also barred. The creditor's remedy on the mortgage is not barred until twenty years—the debt being unpaid." So in *Thayer v. Mann*, 19 Pick. 535, which was a writ of entry to recover possession of the mortgaged premises, the Supreme Court of Massachusetts said: "The creditor has a double remedy, one upon his deed to recover the land, another upon the note to recover a judgment and execution for the debt; and it does not follow that he cannot recover on one, although there may be some technical objection

or difficulty to his remedy upon the other." These decisions are no authority in the case under consideration, for the reasons already given, that the statute makes no distinction in the period of limitation between a simple contract in writing and a contract under seal, and a mortgage deed here does not confer any right of possession upon the mortgagee. It is undoubtedly true, as stated by the Court in the case from Georgia, that the creditor stipulated by contract for two remedies against his debtor to enforce the collection of his demand—the one by action upon the note, and the other by petition and foreclosure upon the mortgage. Similar remedies he can pursue in this State. He can proceed upon the note, and take an ordinary money judgment for the amount due; or he can sue in equity upon the mortgage, and take a decree for its foreclosure and the sale of the premises. The difference is, that here the limitation prescribed to the equitable suit is the same as that prescribed to the action at law. The mortgage is as much within the general designation of a "contract, obligation, or liability, founded upon an instrument of writing," as is the note itself.

We do not question the correctness of the general doctrine prevailing in the courts of several of the States, that a mortgage remains in force until the debt for the security of which it is given is paid. We only hold that the doctrine has no application under the Statute of Limitations of this State. A mortgage is a specialty, and is not within the terms of the English statute, or of the statutes of most of the States. An action founded upon such specialty can only be met by proof of payment. The payment may be established by direct evidence of the fact, and it may be presumed from the lapse of twenty years, when such presumption is not counter-
vailed by evidence from the mortgagee. "Thus," says the Supreme Court of Maine in *Joy v. Adams*, 26 Maine, 333, "a mortgage security has not been deemed to be within any branch of the Statute of Limitations. He who would avoid such security must show payment; otherwise, the mortgagee will not be precluded from entering upon and holding possession of the mortgaged premises. The mortgagor has not been allowed to defeat such right by showing merely that the personal security, to which the mortgage security is collateral, has become barred (*Thayer v. Mann*, 19 Pick. 535); but he has been allowed to allege payment, and for proof to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtedment. Such a lapse of time has been deemed to be sufficient for the purpose, in the absence of any countervailing considerations. This is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption." The view thus stated is met by our statute, which embraces a mortgage security within its terms. Here

payment may be pleaded, and so may the statute itself without reference to the fact of payment.

Our conclusion, therefore, upon the first question presented is, that where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute, the mortgagee has no remedy upon the mortgage; that though distinct remedies may be pursued by him, the limitation prescribed is the same to both.

The second question is one of easy solution. The mortgagor, after disposing of the mortgaged premises by deed of sale, loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is as to the premises thenceforth a mere stranger. And if, instead of selling the premises, he execute a second mortgage upon them, he is equally without power to destroy or impair the efficacy of the lien thus created. But it is said that the plea of the statute is a personal privilege of the party, and cannot be set up by a stranger. This, as a general rule, is undoubtedly correct with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He cannot at his pleasure affect the interests of other parties. His grantees or mortgagees, with respect to the property, stand in his shoes, and can set up any defense that he might himself have set up to the action, either to defeat a recovery of the property or its sale. In the case at bar the defendant Morris had sold his interest in the mortgaged premises; and his grantees, with the other defendant, executed the second and third mortgages after the statute had run upon the note secured by the first mortgage. The subsequent revival of that note continued the personal liability of the defendants. Whether it also revived the mortgage executed by them it is unnecessary to express any opinion, as the defendants do not appeal from the decree. The revival could not affect, and did not affect, the previously acquired liens of the second and third mortgages upon the property; and the intervenors holding those mortgages could interpose the statute to the enforcement of the first mortgage, so far at least as to secure a priority in their liens over that mortgage. The ruling of the Court below, therefore, in postponing the lien of the first mortgage, assuming that the lien was revived, to the liens of the subsequent mortgages, was clearly correct.

*Judgment affirmed.*¹

¹But that the mortgagor is not entitled to affirmative relief, see *De Cazara v. Orefia*, 80 Cal. 132 (1889).

Note: mortgage barred by st. Held note could not get title quieted w/o paying note.

(1) Summary of rules as to barring Eq. redemp. & foreclosure.

a. Equity-redemption. ~~Chas. i only~~ 20 years (St. period) adv. pos. by utge will bar it. Obviously presumption of payment & bar of debt have nothing to do with it. They ~~tend to bar utge~~ but not the utgor. ~~By some cases whenever foreclosure barred redemption is.~~

b. Foreclosure. i. Lapse of 20 yrs raises presumption of payment & if nothing contra then utge barred. But presumption may be overthrown in most any way. Actual Evidence Acknowledgment, part payment, etc. That relationship such as to make payment less likely - brother & sister etc. Actual Evidence of balance due. ~~Even~~ That debtor has been outside state too debt not barred. Any of these overthrow presumption by genl view. Some courts turn down this method of bar by requiring adverse pos. ii. Adverse pos by utgor for 20 yrs. Seldom relied on. because usually barred sooner under i. above or iii. below. iii. Barring of debt itself. Great Conflict. Might with N.Y. Case & is this one. Cases do not divide acc. to title & lien jurisdictions. N.Y. a lien state holds not barred by bar of debt & Ill. a title state holds is barred by bar of debt. Inasmuch as foreclosure is in Eq. where all states consider utge a lien no reason for a dif. betw. title & lien states really.

(2) Arguments:

Technical arguments clearly favor right of authority. Debt still exists tho remedy at law on it barred. Utge is to secure debt & so will secure it as long as it exists. Proceeding

*Mtge given to secure prom. note. No
 Comant to pay in mtge. Action on note
 HARRIS v. MILLS. Vanded by St. L. 1862 for
 closure is barred.*

SUPREME COURT OF ILLINOIS, 1862.

(28 Ill. 44.)

*Mtge is simply an incident
 of a prom note. It is Curran*

The facts of this case are stated in the opinion of the court by Mr. Justice Walker; the same case was before the court at a *under seal* prior time, and will be found reported in volume 25 of these Reports, at page 165. *that is dif.*

The decree appealed from was rendered by Hollister, Judge, at the October term, 1861, of the Marshall Circuit Court. *Mtgor is
 not like a*

WALKER, J. This bill was exhibited to foreclose a mortgage, *tenant for
 all per person
 so he can
 hold ad-
 vantage to
 mtgor v.s.
 Surrendering
 his.* given to secure a note alleged to have been lost. The mortgage bears date the 12th of May, 1837, and recites a note for seven hundred dollars. The note is alleged to have been given on the 9th of April, 1836, by Edwin Mills to appellant, due on the 9th day of September, 1838. The mortgage was not recorded until the 8th day of November, 1855, and appears never to have been acknowledged. It also appears that Edwin Mills, on the 13th day of January, 1839, executed a mortgage on the same land to secure two thousand dollars to Harlow Mills, for indebtedness due to him. This latter mortgage was acknowledged and recorded. Edwin Mills, on the 17th day of February, 1842, conveyed the mortgaged premises to Harlow Mills for the expressed consideration of two thousand dollars. This deed was recorded on the 4th of August, 1842, in the proper office.

The bill charges that this deed and mortgage, from Edwin to Harlow Mills, are without consideration, and are fraudulent and void. It is also charged that they were taken by Harlow with full notice of appellant's prior mortgage. The answer alleges that a consideration was given, and denies all notice of the prior mortgage. The answer also sets up, and relies upon, the lapse of more than sixteen years after the maturity of the note and before the exhibition of the bill, as a bar to a foreclosure. On the hearing, the court below dismissed the bill and rendered a decree against complainant for costs, to reverse which he prosecutes this appeal.

The principal question presented by this record is this: the statute of limitations having barred a recovery by suit on the note, does it form a bar to a foreclosure of the mortgage by bill in equity? Had this been an action on the note, over sixteen years having elapsed after the maturity of the note, the recovery would have been barred. If such an action had been instituted, and a recovery defeated, the judgment could have been interposed

ii as a successful bar to a foreclosure. Or, had an ejectment been brought, and the bar of the statute allowed to defeat a recovery against Harlow Mills or those holding under him, the judgment might also have been relied upon to prevent a decree of foreclosure. Or, had a *scire facias* been sued, and had the statute of limitations been successfully interposed to defeat a recovery, the judgment might have been pleaded to avoid a foreclosure by bill. When the party has elected one of several remedies, and it results in a judgment against the mortgagee, that judgment becomes as complete a bar to a proceeding in a different form for a foreclosure as payment, release, or other discharge.

iii The question, however, still recurs, whether, after several remedies have been barred, but not established in a legal proceeding, the bar may be relied upon in other and different remedies? As a general rule, courts of equity follow the law in allowing the defense of the statute of limitations. A bar of the statute, at law, forms a bar in equity. (Story's Eq. Pl., § 500, § 751.) In equity, as at law, an acknowledgment that a debt is due, and a promise to pay it, will take it out of the operation of the statute. If the mortgagor is permitted to remain in possession twenty years after a breach of the condition, the right to file a bill to foreclose will be generally considered as barred and extinguished. Though in cases of this description, as the law is not positive, but is based upon presumption of payment, it is open to be rebutted by circumstances. (2 Story's Eq., § 1028, b.) This court has repeatedly held, in conformity to the general doctrine announced by the adjudged cases, that the debt is the principal thing and the mortgage is the incident. That the latter follows the consideration of the former. That an assignment of the note operates *ipso facto* to transfer the mortgage. That a payment, release or other discharge of a note satisfies and releases the mortgage. If we are to be controlled by analogy, no reason can be perceived why a bar to a recovery on the note should not produce the same effect on the mortgage.

iv In Great Britain it is usual to insert in the mortgage itself a covenant for the payment of the money. When such a covenant is found in the mortgage, it being under seal, and the debt to secure which it was given is not, a bar to a recovery of the debt, if of a shorter period than a bar to a sealed instrument, could not affect the remedy on the covenant in the mortgage. If the statutory period necessary to bar an unsealed instrument be of shorter duration than a sealed instrument, a mortgage containing such a covenant given to secure the payment of a debt evidenced by an unsealed note would be governed by the longer period required to bar a recovery on sealed instruments. The mortgage in this case con-

in eq. to foreclose is not barred by any St. + so continues until adv. pro. or presumption of payment destroys it. In many states are now Express statute barring foreclosure. But if for any reason the express St. did not apply the old? would remain. Found no intimation that Existence of Exp. St. for rents bar in other ways.

Our case argues to contrary i. T. vs. Sent on debt wd bar foreclosure. If true, is on grd that such a T., unlike St. Lien, discharges debt absolutely & so lien necessarily falls. Seems if T. was on grd that St. Lien. had run vs debt that it shd not be given effect as a destruction of debt but only of adjudication tho no remedy on it. ii If outgor can bar Ejectment by adv. pro. of course that cut off not only utgee's legal title in Ill. but his eq. title also. iii It argues that if Elect one remedy & fail, that bars all. Not true if dif remedies are on dif. rights. iv That debt is prin. thing & utge incident & so is gone as far as debt is gone. [But Ill. is not very consistent with that. Legal title to land doesn't pass with debt & utge remains subject to Equities wh. have been removed from debt.] Best argument. But can distinguish from other cases where that arg. applies. In those cases debt is increased or diminished. Here only one remedy on it is taken away. v Finally Court's distinction from Eng. cases seems unfounded as cases have not gone on that idea & in latest Eng. Case was a chattel utge made w/o a writing & so obviously no cove. want to pay. Again to distinguish the Eng. cases so is inconsistent with Court's arg. i, ii & iii above as in Eng. ~~case~~ (acc. to our Court) when remedy on note is barred that shd bar all other remedies.

but is no
arg that
debt not
bar of
remedy.

(tains no such covenant. This being so, renders the decisions of the British courts on mortgages containing such covenants, and given to secure simple contracts, inapplicable to this case. The statute having barred a recovery on the note, because according to the theory upon which the statute is based, the presumption is that the debt has been paid. There is no evidence in this record showing any promise to take it out of the operation of the statute. These statutes are, emphatically, statutes of repose. Without their aid litigation would never be barred, and titles and possession of property would never be quieted. By the efflux of time, the loss of evidence, the death of witnesses, and the failure of memory, were it not for the bar of these statutes, great injustice would result. These considerations have induced all civilized nations to adopt such laws, differing in detail and in the period necessary to operate as a bar, but all based upon the same principles and to attain the same object. Nor need such enactments work injustice. Persons under disability have allowed to them ample opportunity, after the disability ceases to exist, for the assertion of their rights, and those not under disability have also ample opportunity, within the period of limitation, to assert theirs. To avoid loss the creditor has only to use reasonable diligence, to avoid the bar of the statute.

It has been said that no length of time will bar a foreclosure by a mortgagee out of possession. This is placed upon the ground that the relation of landlord and tenant is supposed to exist between the parties. But such is not the true relation of the parties. For some purposes, and to a limited extent only, a portion of the incidents are the same. To a limited extent, and for some purposes, the relation of vendor and vendee, and trustee and *cestui que trust*, also exists. The relation which the parties bear to each other is peculiar to itself, partaking in some degree of the incidents of these other relations, but analogous in all particulars to no one of them. Whilst a tenant, until he surrenders the possession to the landlord, cannot rely upon the statute, yet the mortgagor, by acquiring an outstanding title and occupying the premises under it for the period, and upon the conditions imposed by the statute, may invoke its aid to prevent a foreclosure. Nor is he, like a tenant, required to account for rents and profits, bound to repair, nor is he impeachable for waste. Other courts have held, and such is clearly the weight of authority, that when the statutory period necessary to bar a recovery at law has elapsed, it will bar a foreclosure. (*Christophers v. Sparke*, 2 Jacob and W. 234; *Jackson v. Wood*, 12 J. R. 242; *Giles v. Barremore*, 5 J. R. 545; *Waterman v. Haskins*, *ibid.* 283; *Jackson v. Myers*, 3 J. R. 383; *Baker v. Evans*, 2 Car. S. R. 614; *Hugh v. Edwards*, 9 Wheat. 497; *Moore v. Cable*, 1 J. Ch. R. 385.) We are,

therefore, for these reasons, of the opinion that when the note became barred by the statute the right to foreclose also became barred, unless the mortgage had contained a covenant for the payment of the money, when it might be that it would require twenty years to produce that effect, as an ejectment would not be barred, under the general limitation law, before that period, unless it be under the seven year limitation acts. No error is perceived in dismissing complainant's bill, and the decree of the court below must be affirmed.¹

Decree affirmed.

¹*Pollock v. Maison*, 41 Ill. 516 (1866); *Newman v. DeLorimer*, 19 Ia. 244 (1865); *Schmucker v. Sibert*, 18 Kans. 104 (1877); *Lilly v. Dunn*, 96 Ind. 220 (1884); Ark. Dig. Stat. L. (1894), § 5094; Miss. Ann. Code (1892), § 2733; Mo. Rev. Stats. (1899), § 4276, accord. Compare *Von Campe v. City of Chicago*, 140 Ill. 361 (1892).

140 Ill. Held where no personal oblig. was no St. Lim. applied until Act of 1872 fixing 10 yrs for foreclosing mortgages so that applied. Overlooks fact that pre-foreclosure shd be barred by 20 yrs add. pro. Pro. that made Act of 1872 inapplicable by its own terms as it excluded all actions to which previous St. Lim. applied. See contra. 117 Ill. 79.

41 Ill. Held mortgages cd not bring Eject. when suit on debt barred. Error on prin. & incident arg. 219 Ill. 200

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